Sheila Polk, SBN 007514
County Attorney
ycao@co.yavapai.az.us

Attorneys for STATE OF ARIZONA

IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **STATE'S RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO ARIZ. R. CRIM. P. 20** **(The Honorable Warren Darrow)**

Comes now the State of Arizona, through undersigned counsel, and respectfully provides the following Response to Defendant's Motion for Judgment of Acquittal Pursuant to Ariz. R. Crim. P. 20. As explained in the following Memorandum of Points and Authorities, there is clearly substantial evidence pursuant to Rule 20 to support Defendant's convictions for three counts of Reckless Manslaughter.

RESPECTFULLY submitted this 6th day of June, 2011.

By Sheila S Polk
SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Table of Contents

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

MEMORANDUM OF POINTS AND AUTHORITIES

I. Substantial Evidence Warrants Conviction for 3 Counts of Manslaughter

To return verdicts of manslaughter, the jury must find beyond a reasonable doubt that Defendant caused the deaths of Kirby Brown, James Shore and Liz Neuman, that he was aware that his conduct posed a substantial and unjustifiable risk of death, that he consciously disregarded that risk, and that his disregard of the risk was a gross deviation from the standard of conduct that a reasonable person would observe in that situation. In determining whether to grant a Rule 20 motion, this court must consider all of the evidence in the light most favorable to the State and draw all reasonable inferences against Defendant. *State v. Clifton,* 134 Ariz. 345, 348, 656 P.2d 634, 637 (App. 1982). The trial court should only grant a Rule 20 motion if there is no substantial evidence to support a conviction under any reasonable construction of the evidence. *State v. Jones*, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997).

Defendant's heat endurance challenge, his version of a sweat lodge ceremony, was held at the end of a five-day event for which he charged approximately $10,000 per participant. The sweat lodge itself, a low wooden frame covered in blankets and tarps that entrapped the heat and allowed minimal air circulation, was the same sweat lodge Defendant had used for his event in 2008, and similar to the tents used by Defendant between 2003 and 2007 for his event. Defendant's challenge, the culminating event of the week, consisted of crowding approximately fifty-six people together in the enclosed, tight, super-heated space for more than two hours. Defendant conducted eight rounds, adding hot rocks and buckets of water between each round to create extreme heat and humidity. Defendant told participants that in order to get the most from their investment, they should participate 100% and "play full on." Defendant promised participants he would facilitate their "enlightenment" and their "breakthroughs" through the

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

activities of the week. Defendant conducted all the activities of the week, preparing his participants for the ultimate event, the heat endurance challenge. By Defendant's own admission, his conduct throughout the week was intended to and did wear participants down, "to get them less grounded" in order to have "an altered experience." Defendant told them that they would have "threshold experiences" that would be uncomfortable but were necessary to grow in capacity. He promised them they would leave changed people.

This Court heard uncontested testimony about the specific events of the week and testimony from witnesses who described the effect of those events on their state of mind as they participated in Defendant's heat endurance challenge. Uncontested trial testimony established that for many of the participants, the events of the week were a surprise. Uncontested trial testimony established that Defendant told participants his seminar was "an accelerated learning program" and they should not waste time sleeping. The head shaving event, in which both Kirby Brown and James Shore participated, was symbolic of "playing full on." The "Code of Silence" and the Samurai Game taught participants – and the victims – to obey Defendant and that there were consequences for your teammates if you disobeyed him. Several witnesses testified that when a participant did not play full on, they were chastised. The Vision Quest – thirty-six hours without food or water, restrictions on movement and confinement to a small circle – reinforced absolute obedience in order to get the most from the event. Defendant emphasized all week that participants should allow others to have their own experience, to "let them have their own journey," and ignore the instinct to help others in distress. Many witnesses testified how they were tired, hungry, exhausted, mentally weak and fully conditioned to follow Defendant's directions by the time they entered his final event, the sweat lodge, the extreme heat endurance challenge.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

The jurors heard the recording of Defendant's briefing before his heat endurance challenge, and heard him brag that his was "not a weenie-ass lodge like everyone else." [1] *Exhibit A, Transcript of Defendant's Pre-Sweat Lodge Briefing, para.* 7. The jury heard Defendant's own words when he told participants the sweat lodge was "a way to prove to yourself and to prove to the universe that you're willing to do whatever it takes to truly accomplish the intention you've said is most important to you." *Id. at para. 1.* The jury heard Defendant's own words when he told participants "when you have faced your own death you stared it in the eyes and you've overcome it, then life's never the same, it's really not." *Id. at para.7.* The jury heard Defendant's own words when he instructed participants "you've got to just, you've got to surrender to it and you've got to get into the sacred space." *Id. at para. 20.* The jurors heard Defendant's own words when he told participants "if you choose to play full on which I'm gonna challenge you to do, you're gonna have one of the most intense altered states you've ever had in your entire life and may ever have in your entire life." *Id. at para. 4.* The jurors heard Defendant's reassurances of when he said "you can do this. You can do this regardless of whether you think you can. We've been doing this for years, you can do this. It is a matter of whether or not you will." *Id. at para. 22.* The jurors heard Defendant's own words when he promised them "You will feel as if you're going to die. I guarantee that. But you see the true spiritual warrior has conquered death and therefore has no fear and no enemies in this lifetime or the next because the greatest fear that you'll every experience if the fear of what, death. You will have to get to a point where you surrender and it's okay to die." *Id, at para. 4.*

[1] Attached as Exhibit A for the Court's convenience is a transcript of the briefing. The audio of the briefing is Trial Exhibit 747.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

The jurors heard Defendant's own words when he told his participants "and so you cannot leave during a round." *Id. at para. 29.* The jurors heard Defendant's own words when he told his participants "that means you don't talk over me, you don't say anything unless you're asked to say anything." *Id. at para. 11.* While participants who were conscious and able to move were arguably free to leave the tent between rounds, many participants were unable to do so by reason of their altered mental status, the hallmark of heat stroke, including unconsciousness. Some witnesses testified they felt obligated or bullied to stay in as a result of the events of the week that preceded the heat endurance challenge. Others testified they were influenced by their financial investment of $10,000 to stay in the super-heated environment in hopes of achieving the "breakthrough" marketed to them by Defendant. All participants testified they trusted Defendant's assurances they could make it through all the rounds and that it was safe to ignore their bodies' signs of distress. At least one participant, Dawn Gordon, testified she understood the sweat lodge event could cause death but trusted Defendant that he would keep her and others safe.

The audio of Defendant's pre-sweat lodge briefing is uncontroverted evidence that Defendant knew participants would not rely on their own instincts as to the potential serious harm to themselves or others and is compelling evidence of his culpable mental state of recklessness. Defendant was "consciously disregarding a substantial and unjustifiable risk that the persons being exposed to intense heat and potentially fatal conditions would ignore their own physical symptoms (and the signs of distress in others) in reliance on the Defendant's assurances and in obedience to his directions during the ceremony." *Court's Ruling on Defendant's Motion to Exclude Audio Recordings of 2009 Spiritual Warrior Seminar Events, 2/28/11 at 2.*

Defendant's actions controlled every aspect of the "ceremony," which Defendant chose to hold in the sweat lodge at Angel Valley. Defendant controlled the number of rounds; he

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

controlled the length of each round; he controlled the length of time for his entire event; he controlled the heat inside the tent by controlling the number of rocks brought in for each round; he controlled the hot steam inside the tent by the amount of water he poured on the hot rocks; he controlled how much heat would escape and how much fresh air could enter the tent by controlling how long the flap was open in between each round; and he controlled when the flap would open and when it would close.

Defendant intended everything to occur that occurred, except death. Defendant intentionally used heat and humidity to create an altered mental status in his participants. Defendant knew and intended that the victims would experience physical effects and mental status changes from the heat and, specifically, that they would experience an altered mental status, including losing consciousness. Defendant intentionally induced heat stroke to take participants to the edge of death, to show them the altered experience of near-death. Dennis Mehraver testified that when the ceremony was over, he said to Defendant: "James, I think I died." With a smile on his face, Defendant replied: "You were reborn; go take a shower and get cleaned up."[2] This statement was made by Defendant after the event in an environment described by many as "chaos," "mass suicide," and a "MASH" scene.

Several witnesses testified that they called out or heard others call out with concern for the well-being of both Kirby Brown and Liz Neuman. Witnesses also testified that Defendant responded to both situations, acknowledging the statements of concern. In spite of this knowledge, and Defendant's knowledge of the growing distress of many participants as each round progressed, Defendant did not check up on any participants or stop his event, and instead,

[2] All references to trial testimony are based upon the State's notes of trial testimony and a good faith belief as to the testimony of witnesses. The State did not purchase a complete transcript of the trial testimony.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

continued to create more deadly heat by bringing in more heated rocks, more water and more steam to the already super-heated environment.

Apparently alarmed at the large number of stones called for by Defendant before the 5th round, Megan Fredrickson, Defendant's employee, warned him: "James, these people are your responsibility." Nonetheless and aware that participants had passed out inside the sweat lodge and lay there unconscious, Defendant continued to act – to introduce more heat, more water, more steam, exhorting participants to stay in and ignore their bodies' signs of impending heat illness ("you are more than that; you are more than your body") – thereby creating more heat, more humidity, and more carbon dioxide.

The State has proven beyond a reasonable doubt that the three victims died as a result of exposure to the heat. The evidence also shows that the air inside the sweat lodge was compromised due to carbon dioxide, high humidity and lack of circulation. All of the State's medical experts testified to a medical degree of certainty that the three victims died as a result of exposure to the heat. Dr. Dickson, who reviewed all the medical records, the law enforcement reports, and examined all other possible causes of death such as toxins or organophosphates, unequivocally testified the victims died of heat stroke or as a result of heat stroke. Evidence that many sweat lodge ceremonies have been conducted in the same sweat lodge at other times and that the only time participants experience significant distress is when Defendant runs the event is proof that some unknown event, such as toxins, did not cause the deaths. Finally, the State has proven beyond a reasonable doubt that the Hamiltons used very few chemicals on their property, and used **no** chemicals containing organophosphates. Dr. Dickson, the only doctor who has treated patients with organophosphate poisoning, testified that while a few of the symptoms for heat stroke may overlap with symptoms of organophosphate poisoning, the two illnesses are not

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

mistaken; death due to organophosphate poisoning occurs when the patient drowns in the excess saliva produced. Many witnesses who fell ill lay on the backs during the event; many patients were strapped to gurneys on their backs; the three victims were strapped to gurneys on their backs; not a single patient subsequently drowned in their saliva.

The only two people who were not rendered unconscious in the back area of the sweat lodge during the heat endurance challenge were Mark Rock and Dawn Gordon, both of whom had access to outside air every time Mr. Rock lifted the flap. Everyone else in that immediate area, Kirby Brown, James Shore and Sidney Spencer to the left, and Sean Ronan and Tess Wong to the right, fell unconscious during the ceremony. Dr. Dickson testified none of the volatiles found in the materials tested the DPS Crime Lab were present in sufficient quantities to be toxic.

Witnesses at trial testified that Defendant's conduct during his event was a gross deviation from the conduct of other sweat lodge facilitators. Witnesses testified Defendant's event was much hotter and longer than other sweat lodges they have attended or assisted; that he called for more rocks and water than any other sweat lodge facilitator; that he failed to check on participants throughout his event; that he continued his ceremony in spite of the obvious distress of the participants; including his knowledge that Liz Neuman was struggling and Kirby Brown was unconscious, without checking on their well-being; that he continued to introduce the lethal heat and steam, causing even more participants to suffer medical distress; and that participants fall ill only during sweat lodge ceremonies performed by Defendant. Defendant's conduct is a gross deviation from the standard of conduct a reasonable person would observe in that situation.

Circumstantial and direct evidence conclusively proves that Defendant was aware of the obvious risks in conducting a heat endurance challenge, and the risks in leaving participants who are in altered states of consciousness in the heated, compromised environment. Defendant acted

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

recklessly by consciously disregarding that obvious risk. The risk of death created by an enclosed hot environment, whether it is a car on a hot summer day or a locked bedroom in a warm house, is well-known. It does not require a scientific or medical background to know that exposure to a "tight, enclosed space and intense temperatures" is harmful to people's lives.

The waiver that Defendant required all participants to sign releasing Defendant and JRI of liability for Defendant's acts resulting in death is evidence that Defendant knew of the substantial and unjustifiable risk of his conduct. The waiver (1) warned participants of "a sweat lodge ceremony (a ceremonial sauna involving tight, enclosed spaces and intense temperatures)"; (2) informed participants "there are inherent risks in the Activities;" (3) warned participants "there is a risk I may receive injuries requiring medical attention;" (4) warned participants that people "may have been seriously injured by participating in the Activities;" and (5) warned participants they might "suffer physical, emotional, financial or other injury during any of the activities and there is and can be no assurance or guarantee regarding my health or safety in connection with my participation in the Activities." *Trial Exhibit 399,* Spiritual Warrior Release Waiver of Liability, Assumption of Risk, Indemnity Agreement and Disclaimer.

Defendant's conduct during the heat challenge itself is further evidence of his conscious disregard of the substantial and unjustifiable risk of death created by his conduct. During Defendant's heat endurance challenge, many participants fell ill and were dragged out of the sweat lodge, right in front of Defendant, who neither stopped his "ceremony" nor checked on those in distress. By round 4 of Defendant's event, the normal length of a sweat lodge ceremony conducted by a reasonable person, there was growing chaos and distress. By round 6:

- Debby Mercer testified that a man (Dennis Mehavrer) was screaming he was about to have a heart attack. She heard Defendant say: "Who is yelling?" and participants told Defendant it was Mehraver. Mercer testified she then heard Defendant call Mehraver by name and say: "It is fine. It's a good day to die, just go with it." Mercer testified she said

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

out loud: "It's a good day to live." Mercer testified she dragged out ten people during the heat endurance challenge right in front of Defendant, who remained at his position by the door, and that she assisted twenty-five more.

- Dennis Mehraver testified he had a position in the same area as Kirby Brown and James Shore, around 10 o'clock and the inner circle. Mehraver testified there was no fresh air where he sat, even when the flap opened. When asked whether he would save someone who was dying, Dennis testified: "If it was a normal day and someone is hurt, of course I would help. But in that tent – I was in pain - I don't know if I could." When asked if he would save the person next to him if he knew he was dying, Dennis testified: "I probably would wait until round was over and ask for help... I wouldn't have stopped the ceremony." Mehraver testified by round 4, he was losing awareness. Before round 6, he tried to crawl out and lost consciousness. Defendant never checked on his condition. Later, according to Mehraver's uncontested testimony, he told Defendant: "James, I think I died." Defendant smiled and told Mehraver: "You were reborn, go take a shower and get cleaned up." Mehraver testified he was later attended to by a paramedic who could not find a vein because he was so dehydrated. Ex. 193, the paramedic's report, substantiates this testimony.

- Ted Mercer, the fire tender, testified he also heard Dennis Mehraver scream he was having a heart attack and "I don't want to die." Mercer testified he heard Defendant respond by telling Mehraver he was more than his body and he was not going to die.

- Beverly Bunn testified that "everything went crazy around round 6. She testified that she saw Sydney Spencer dragged out, completely lifeless, right past Defendant. Defendant shouted out that everyone was to "quiet down, I am in charge, no one is to talk!"

- Scott Barratt left the tent at the 4th round and crawled back in for 6th round. The first thing he noticed was a heavy woman is in his path, passed out (Linda Andresano). Defendant was telling someone to move Linda, but the person could not because Linda was on his leg. When Scott tried to move Linda away from pit and heat, Defendant yelled at him to stop. Scott then thought he would lay in front of her, between the pit and her, but was afraid Defendant would yell at him again. Scott testified Defendant knew Linda was unconscious and said: "just leave her, we need to keep on going." Linda was later dragged out unconscious after the ceremony was over.

- Mike Oleson testified he left the tent after the 5th round and returned for the final round. Oleson testified that as he made his way in to find a place to sit, a participant named Christine was in his path, babbling and holding onto her pouch. Oleson testified Defendant yelled at him to get out of the way and let the lady get back to her seat. Oleson testified he next tried to help a lady who was passed out and was leaning up against the side of the tent. When Oleson tried to make her lie down without success, he asked for help, but found that everyone around him was out of it. Defendant told Oleson to leave the woman alone, that she would be fine, and that they needed to continue with the ceremony. When asked why he did not stop the ceremony, Oleson testified he would not interrupt Defendant.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Liz Neuman

1) Jennifer Haley, a Dream Team member, testified about Defendant's reaction when he found Liz Neuman and other Dream Team members drinking wine on Wednesday evening. Haley testified as to her belief that Liz Neuman felt ashamed and what happened to Liz inside the sweat lodge had everything to do with her desire to prove to Defendant "she was more than that."

2) Laura Tucker testified she sat at the 9 to 10 o'clock position, near Liz Neuman, that Liz coached those around her on tips to survive, and that she found Liz's presence a great comfort. Ms. Tucker testified that around the 4th or 5th round, Liz unexpectedly left Tucker's side and moved closer to the pit of hot rocks, eventually coming to rest on Tucker's raised legs. When Tucker tried to get Liz to come back, Liz brushed her hand away. Tucker, concerned about Liz's condition, then called out to Defendant: "James, it's Laura, I'm concerned about Liz." Tucker testified Defendant did not investigate the situation, did not check on Liz or ask another staff or Dream Team member to check on Liz. Instead, Defendant said: "Liz has done this before and she knows what she's doing." *After Defendant had stated Liz knew what she was doing,* Tucker then touched Liz's left shoulder and asked Liz if she was all right. Liz answered "yes" in a voice that was labored, but loud enough for Tucker to hear. Tucker then asked Liz if she needed to get out and Liz said "no," not moving except to turn her head. Tucker testified because she had heard Defendant say Liz knew what she was doing, and because Liz had responded promptly, Tucker let things be. Tucker testified she had no idea there was any cause for immediate concern and, if she had, she would have done everything in her power to stop and get Liz out.

3) Laurie Gennari testified her position in the tent was at the 9 o'clock position, near Liz Neuman. Ms. Gennari testified that she glanced at Liz Neuman after the 6th round and "she looked awful, like a drunk." Ms. Gennari heard Laura Tucker call out that Liz was in trouble and heard Defendant respond: "Liz knows what she's doing." Ms. Gennari heard Laura Tucker ask Liz if she is ok and Liz responded "yes," *after Defendant had stated out loud that Liz knew what she was doing.* Ms. Gennari described the collapsing of Liz Neuman and how, when asked by Laura Tucker if she wanted to leave, Liz responding, slurring: "no, no, no, no." Ms. Gennari testified she had suspended her normal common sense in order to have the experience as instructed and promised by Defendant, and that she had been instructed many times by Defendant to "let them have their own experience."

4) Debby Mercer testified she was stationed at the door of the tent for the heat endurance challenge. When the flap was open, Mercer heard someone say: "I can't get her to respond." Mercer heard Defendant reply: "She's been down this road before. She will be ok." Mercer then heard Defendant say to worry about yourself, don't worry about them.

5) Lou Caci testified that he re-entered the tent for the last round and as he crawled in, Defendant said to him: "This one's for you, Lou." Mr. Caci took a position near Liz

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Neuman, at the 7 to 8 o'clock position. Mr. Caci heard Liz's breathing which he described as similar to the breathing of his father and brother shortly before they each died.

6) Kim Brinkley testified she heard Laura yell out she was concerned about Liz, that Liz was unresponsive, and that Defendant replied: "Liz has done this many times, she'll be fine." She testified she also heard Defendant say: "Wait until the end and we'll take care of her."

Kirby Brown and James Shore

1) Jennifer Haley, a Dream Team member, testified that Kirby "died" early in the Samurai game. Haley recalled the intensity and the pain endured by Kirby as she lay on the ground, bladder full, vomiting, not moving, for more than five hours. Haley testified how cold Kirby appeared and that when it was over, Kirby was teary-eyed and hugged Haley, saying "thanks for being so nice to me." Haley testified she remained outside during Defendant's heat endurance challenge, and that during the ceremony, she heard someone say "you need to get her out."

2) Melinda Martin, staff with James Ray International, testified that she led Kirby Brown to her spot for the Vision Quest and that she was much shaken. Thirty-six hours later, when Martin retrieved Kirby from her Vision Quest, she had decorated her medicine wheel. After the Code of Silence was lifted, Kirby was proud of her accomplishment.

3) Melissa Phillips testified she left after the 3rd round, then came back in for the last three rounds because she did not want to disappoint Defendant, herself or the Dream Team members. Phillips testified she laid face down at the 2 o'clock position with her face turned toward Kirby Brown. Phillips noted the distress of Kirby Brown and called out 5-6 times that there was something wrong with Kirby and she needed to be taken out. Phillips testified she called out to Defendant loud enough for him to hear her, and that someone responded "she's fine," but Phillips did not recognize the voice. Phillips testified a participant named Teresa directed others to roll Kirby over and Kirby then stopped snorting; Phillips testified she could not tell if Kirby was breathing. Phillips also testified that several people passed out and were dragged out passed Defendant who was seated at door. Phillips testified someone she believed to be James Shore tried to crawl out the back of the lodge and that Defendant chastised him not to do it.

4) Beverly Bunn testified around round 6 or 7, she heard a voice say "I can't get her to.. someone's not breathing." She heard Defendant respond: "Door is closed. This round has begun. We'll deal with it at the end of the next round." Dr. Bunn testified they were all told to be quiet, and that at the end of the round, Defendant opened the door and asked everyone to come back in. Dr. Bunn knew someone was in trouble and waited for Defendant to check up on her; Defendant did not check on anyone and instead, started the final round. Dr. Bunn further testified that when the event was over, Kirby Brown was lying face up, making a gurgling, snorting sound.

5) Laurie Gennari testified she sat at the 9 o'clock position in the tent and stayed in the whole time, moving to the 3 o'clock before the last round. Ms. Gennari testified she heard a

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

voice call out from the 1 to 2 o'clock position "she's not responding," and, at another time, "she's not breathing." Ms. Gennari heard Defendant respond "Leave her there, we'll deal with it at the end of the round."

6) Dr. Nell Wagnor, the gynecologist from Juneau, Alaska, testified she stayed in the sweat lodge the whole time at the 5 o'clock position. She testified she lost track of time, but was aware that people were being dragged out and others seemed to be unconscious. Dr. Wagnor testified around the middle rounds, the flap was put down and she heard someone say: "Wait, there's one more." Wagnor testified she sat just a few feet from Defendant and heard him reply: "They'll have to wait until next round."

7) Mark Rock testified that around 6th or 7th round, he heard Kirby making a gurgling noise. The sound of her gurgling was the only sound there was and it was in between rounds. Rock testified that when Defendant wanted to close gate, Rock heard someone say: "I think she's in trouble, she needs to get out." Rock testified the voice came from the 10 o'clock position. Rock testified he then heard Defendant say: "We're closing the gate and we'll deal with that after this round." Rock also heard James Shore struggling during the final rounds.

8) Kim Brinkley testified she heard labored breathing coming from the area where Kirby Brown sat and that it was concerning.

9) Dawn Gordon testified that James Shore dragged out Sydney Spencer, who was unconscious, between the 6th and 7th rounds, then came back to his position in the tent near Kirby Brown. He then called out "we need help over her." When Defendant stated "the door is closing, no one can leave," Gordon and Shore rolled Kirby to her side and encouraged her to keep breathing. At the end of the 7th round, Gordon testified Shore again called out for help for Kirby, this time in a weaker voice. Again, Defendant announced the door was closing and no one could leave. Gordon testified that Shore then lifted the edge of the tent for air, but Defendant yelled to turn off the light. Shore and Brown were both unconscious when the ceremony ended. Gordon acknowledged she told the detective that Shore yelled out for help for Kirby, and that he said: "Kirby needs to get out." Gordon also testified that Shore was struggling in the tent for most of the event.

10) Debby Mercer testified that around the 6th or 7th round, James Shore dragged someone to door of the tent, right in front of Defendant. Mercer saw Shore knock his head on the frame of the tent, and later saw a scratch on his head. (Exhibit 375, the autopsy report for James Shore, indicates a red cutaneous abrasion on his upper forehead.) Mercer testified she later heard someone say that: "So and so's unconscious, I can't get them to respond." She then heard Defendant reply: "Really, they're not breathing?" Someone answered "no," and Defendant stated: "They'll be fine, that's where they need to be." Mercer testified Defendant then instructed her to close the door after checking to see if anyone else wanted to come back in the tent. Mercer testified no one was taken out of the tent unconscious at that time. Mercer testified that things were quiet inside the sweat lodge for the last round.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

11) Sarah Mercer testified that she was by the door whenever the door was opened between rounds. Near the end of the heat endurance challenge, Sarah Mercer heard someone say there were a few people unconscious. Sarah then heard Defendant say that was a good thing. Mercer further testified she heard someone ask Defendant if they should take them out, and Defendant replied they had one round, to just leave them there, and they would be okay. Mercer testified the final round lasted approximately fifteen minutes.

12) Fawn Foster testified that while sitting outside the tent, she heard someone say there were three people down, and that she heard Defendant ask whether they were breathing. She did not hear a reply, but heard Defendant say: "Leave them until the end of the next round."

In spite of the fact that Defendant knew that participants were passing out inside the tent, Defendant discouraged participants from leaving (Beverly Bunn and Laurie Gennari). The Dream Team members and staff at the corners of the sweat lodge were either severely compromised (Mark Rock), left early (Josh Fredrickson) or passed out and later died (Liz Neuman). Outside, witnesses observed Dream Team members trying to push a lady in a white bathing suit back in. Debby Mercer intervened on the lady's behalf.

The relevant inquiry for a Rule 20 determination is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. " Substantial evidence is such proof that a "reasonable person could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt."

Looking at the entire record, and viewing the evidence in the light most favorable to the prosecution, it is clear that any rational trier of fact can find that the essential elements of manslaughter have been proven beyond a reasonable doubt. It is equally clear that "but for" Defendant's conduct, the three victims would not be dead and that their resulting deaths are not so extraordinary that it is "unfair to hold the defendant responsible for the result." [3] As explained below, the evidence proves beyond a reasonable doubt that Defendant's conduct caused the

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

deaths of the victims and there is no intervening event that is "unforeseeable and, with benefit of hindsight, abnormal or extraordinary" so as to excuse Defendant from criminal liability.

II. Rule 20 Standard

Rule 20, Ariz. R. Crim. P., provides that the trial court may on motion of the defendant or *sua sponte* declare a verdict of acquittal after the State has rested its case. "A Rule 20 motion is designed to test the sufficiency of the state's evidence. If no substantial evidence exists that the defendant committed the crime, then the trial judge must enter a judgment of acquittal." *State v. Greene,* 168 Ariz. 104, 107, 811 P.2d 356, 359 (App. 1991), *quoting State v. Neal,* 143 Ariz. 93, 98, 692 P.2d 272, 277 (1984). In determining whether to grant a Rule 20 motion, the trial court must consider all of the evidence presented in the light most favorable to the State and draw all reasonable inferences against the defendant. *State v. Clifton,* 134 Ariz. 345, 348, 656 P.2d 634, 637 (App. 1982). The trial court should only grant a Rule 20 motion if there is no substantial evidence to support a conviction under any reasonable construction of the evidence.

> A judgment of acquittal under Rule 20 is appropriate only when "no substantial evidence [exists] to warrant a conviction." Ariz. R.Crim. P. 20(a). "Substantial evidence" is "evidence that would convince an unprejudiced thinking mind" about the truth of the fact for which the evidence is presented. *State v. Atwood,* 171 Ariz. 576, 597, 832 P.2d 593, 614 (1992). "If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." *State v. Tison,* 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981) (citations omitted).

State v. Jones, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997).

"Substantial evidence is more that a 'mere scintilla' and is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes,* 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). The substantial evidence required to support a conviction may be either direct or circumstantial. A motion for acquittal pursuant to Rule 20

---

[3] *State v. Marty*, 166 Ariz. 233 237, 801 P.2d 468, 472 (App. 1990).

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

questions only the sufficiency of the evidence, not its competency. *State v. Adrian,* 111 Ariz. 14, 16-17, 522 P.2d 1091, 1093-1094 (1974), *citing State v. Acosta,* 101 Ariz. 127, 416 P.2d 560 (1966); *State v. Holliday,* 92 Ariz. 168. 375 P.2d 370 (1962). In considering a motion for acquittal, a trial judge must give "full credence to the right of the jury to determine credibility, weigh the evidence, and draw justifiable conclusions therefrom." *State v. Clifton,* 134 Ariz. 345, 348, 656 P.2d 634, 637 (App. 1982). *See also State v. Tubbs,* 155 Ariz. 533, 535, 747 P.2d 1232, 1234 (App. 19787).

"It is not necessary to prove the crime beyond a reasonable doubt." *State v. LaGrand,* 138 Ariz. 275, 280, 674 P.2d 338, 343 (App. 1983). "The trial court has a duty to deny a motion for judgment of acquittal if the evidence is of such substance that a jury could determine a crime was committed." *Id.* "The test is whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. McCoy,* 187 Ariz. 223, 225, 928 P.2d 647, 649 (App. 1996), *citing Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "When reasonable minds may differ on the inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal." *State v. Lee,* 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997), *citing State v. Landrigan,* 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

III. Mens Rea

Arizona Revised Statutes § 13–1103(A)(1) sets forth the elements of the crime of Manslaughter and A.R.S. § 13–1102 sets forth the elements of the crime of Negligent Homicide. The statute defining the culpable mental states of "recklessly" and ""criminal negligence" is A.R.S. § 13–105(6)(c) and (d).

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

In order prove either negligent homicide or manslaughter, the State must first prove that Defendant caused the deaths of Kirby Brown, James Shore and Liz Neuman. Both crimes require the State to prove that Defendant's conduct caused the deaths of the victims, not how the victims died. The State must also prove that Defendant's conduct created a substantial and unjustifiable risk of death and that Defendant's disregard of the risk was a gross deviation from the standard of conduct that a reasonable person would observe in that situation. Finally, the State must establish one of two mental states: to prove manslaughter, the State must establish that Defendant was aware of the risk and consciously disregarded it. To prove negligent homicide, the State must establish that Defendant failed to perceive the risk. The element of the greater offense of manslaughter not found in the lesser is awareness of the risk. As explained below, Defendant's culpable mental state can be established by circumstantial evidence.

A. Defendant was aware that his conduct posed a substantial and unjustifiable risk of death and he consciously disregarded that risk.

Case law makes it clear the issue of a defendant's mental state may be inferred from circumstantial evidence. See *In re William G.,* 192 Ariz. 208, 213, 963 P.2d 287, 292 (App. 1997) ("We recognize that absent a person's outright admission regarding his state of mind, his mental state must necessarily be ascertained by inference from all relevant surrounding circumstances."); *cf. State v. Routhier,* 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983) ("Criminal intent, being a state of mind, is shown by circumstantial evidence. Defendant's conduct and comments are evidence of his state of mind."). Of relevance to the case at bar are the cases holding that a jury can infer that a person who leaves a child in a hot car knows the risk of death associated with that act and acts recklessly.

In *People v. Kolzow*, 703 N.E.2d 424, 301 Ill.App.3d 1 (Ill. App. 1998), the defendant was found guilty of involuntary manslaughter for recklessly leaving her three-month old child in a

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

locked car for four hours.[4] The autopsy revealed the child died of heat stroke and that the child was otherwise well cared for and clean. The evidence established the defendant left the child in the car while she took a nap, and that she rolled down the rear car windows about four inches. Witnesses testified they had seen the defendant leave the child unattended in the care on other occasions. On appeal, the defendant asserted the evidence failed to prove she acted recklessly by leaving the child unattended in a car for four hours, resulting in his death, arguing there was no evidence she knew the car would become so overheated that it was a danger to her baby. The appellate court disagreed, finding that when the defendant left her three-month-old son in the vehicle, she consciously disregarded a substantial and unjustifiable risk of death or great bodily harm to her son. "We believe a reasonable person would be aware of the risks in leaving a three-month-old infant unattended in a parked car for four hours on a summer day, and find the evidence supports the trial court's finding that defendant acted recklessly by consciously disregarding that clear and obvious risk." *Id.* at 429.

In *People v. Maynor*, 256 Mich.App. 238, 662 N.W. 2d 468 (2003), the defendant was charged with two counts of felony murder with first degree child abuse as the underlying felony for leaving her two small children alone in a hot car for approximately 3-1/2 hours. The medical examiner determined that the cause of death was hyperthermia, or heat exposure, from being left in the hot car. The district court bound the defendant over on two counts of involuntary manslaughter and the prosecution moved for reinstatement of the original charges. The circuit

---

[4] The definition under the Illinois Criminal Code of "recklessly" is nearly identical to the Arizona Criminal Code: "A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, * * * and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 IlCS 5/4-6 (West 1996). *People v. Kolzow*, *supra*, 703 N.E.2d 424, 429, 301 Ill.App.3d 1.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

court granted the motion to reinstate the felony murder charges and the defendant appealed. The issue on appeal was whether first degree child abuse was a specific or general intent crime. Upholding the reinstatement of the felony murder charges, the court observed that the defendant's act of leaving the children in the car unattended was intentional, not accidental. The court therefore concluded that the defendant had specifically intended to seriously harm her children. "[A]lthough defendant's statement suggested that she might not have known that the children were at risk, it is worth noting that the evidence also suggested that she rolled down at least one of the car windows about an inch and a half. These acts belie her claim of ignorance of the risks." *Id.* at 245-246. Most relevant to the case at bar is the following quote set forth in footnote 3 of the opinion:

> It is questionable whether her claim of ignorance is even sufficient to defeat the rather obvious fact that hot weather makes cars very hot. The prosecution compellingly argued below that people know not to leave milk in their cars on hot days. Indeed, every new driver quickly learns that, on hot days, the temperatures inside a car will exceed the outside temperature in a relatively short period. **In other words, it does not require a scientific background to know that cars get very hot on summer days. Nor is extensive medical knowledge required to realize that such temperatures are harmful to people, especially children.** Thus, we believe a jury should appraise the veracity of defendant's statements regarding her knowledge of the risks, or lack thereof.

Id. at 263, 482. (emphasis added) *See also Lincoln General Insurance Co v. Aisha's Learning Center*, 468 F.3d 857, 860 (2006) ("Unfortunately, the danger of leaving children in locked vehicles during extreme weather conditions is well known; it is a danger inherent in the manner in which automobiles trap heat.")

Lovejoy v. Arpaio, 2010 WL 466010 (U.S. District Court, Arizona 2010), an Arizona case involving a forgotten dog left in a hot car, presents a good discussion of the mental state of "recklessly" and notes that "[a] person's mental state is generally ascertained by inference from all of the relevant surrounding circumstances." (*citing In re William G., supra,* 192 Ariz. 208,

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

213, 963 P.2d 287, 291 n. 1). The court summarized the scenarios where leaving a child in a hot car constitutes strong circumstantial evidence of recklessness: (1) where there was evidence the children had been previously neglected or were unwanted; (2) where there was evidence the defendant willfully created the conditions that led to the children being placed at risk of serious harm; (3) where there was reason to believe the parent had not merely forgotten their child in the hot car; and (4) cases involving very young children wherein the adults caring for them were expected to be vigilant as to their well-being and whereabouts. *Lovejoy v. Arpaio*, *supra*, 2010 WL 466010 at 6-8. In examining the relevant cases, the court found that a reasonable person with knowledge of the facts of the case would not conclude that Sgt. Lovejoy consciously disregarded the risk to his dog.[5]

An examination of the four factors set out in *Lovejoy* persuasively proves Defendant's conduct in the case at bar was reckless. Defendant willfully and intentionally created the conditions that led to the victims being placed at risk of death (*Lovejoy* 2nd factor); this is not a case where the defendant is arguing he forgot he had placed the victims in the hot environment (*Lovejoy* 3rd factor); and there is no dispute that Defendant provided assurances to participants that it was safe to ignore their own physical symptoms of distress and the distress of others, and

[5] "A reasonable person with knowledge of these facts and only these facts would not have believed that Sgt. Lovejoy was reckless by "consciously disregarding" the risk to Bandit. There is no allegation that Sgt. Lovejoy ever neglected Bandit. To the contrary, the allegation is that Sgt. Lovejoy was an animal lover who lavished upon Bandit, rescued dogs, and volunteered to help his police department raise money to purchase new dogs. There is no allegation that Sgt. Lovejoy was intoxicated or that he otherwise created the conditions that led to Bandit being at risk. Sgt. Lovejoy was sleep deprived and stressed, but only because he had been called to work overtime by the Chandler Police Department and because of external family pressures. Bandit was not in the backseat of a car where he could easily be spotted-he was in a kennel, asleep, in the rear of the SUV. The allegations in the complaint indicate that Sgt. Lovejoy sincerely forgot that Bandit was in the SUV for reasons not caused by his own prior recklessness or fault. A person who fails to perceive a risk, even when the failure to do so is a "gross" deviation from applicable norms, can

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

that Defendant knew participants were in distress (*Lovejoy* 4th factor). In contrast to the reported cases of children left in hot cars, none of which involve a parent who intentionally left the child in the hot car, Defendant intended to place the participants in the hot environment and intended that they experience the physical symptoms of extreme heat.

In *State v. Marty*, 166 Ariz. 233, 236, 801 P.2d 468, 471 (App 1990), the defendant provided drugs and alcohol to the minor driver of vehicle. While heading for Eagar on the highway, the victim exceeded the speed limit, failed to negotiate a turn, left the road and rolled the vehicle. The victim-driver was ejected from the car and was killed. The defendant, the passenger, survived with minor injuries. The defendant pled guilty to manslaughter and theft. At the change of plea hearing, the defendant denied knowing the victim was unable to operate the vehicle in a safe manner because he, too, was intoxicated. At sentencing, the defendant stated he did not intend to cause the death of the victim. On appeal, the Court of Appeals examined the record to determine whether a factual basis existed for the crime of manslaughter, finding that by supplying drugs and alcohol prior to accident to the driver, the defendant was both "cause in fact" and proximate cause of the driver's death.

The Arizona Court of Appeals rejected the defendant's argument that because he did not encourage the victim to drive and could not have persuaded her from driving, his actions did not constitute a conscious disregard of a substantial and unjustifiable risk that would result in the death of the victim. "Looking at the entire record, it is clear that the defendant offered the illicit drugs, encouraged Nuanez's indulgence in them, provided the pipe which enabled Nuanez to

---

only be negligent, not reckless. *See In re William G.,* 192 Ariz. 208, 213, 963 P.2d 287, 291 n. 1 (Ct.App.1997). *Lovejoy v. Arpaio, supra*, at 9.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

smoke the marijuana, and was the conduit through which Nuanez, a minor, obtained alcohol. The defendant knew that Nuanez would be driving during all of this. The record demonstrates that defendant did everything possible to encourage Nuanez's continued participation in the intoxicating spree which lasted over seven hours." *Id. 237*, 801 P.2d at 471.

The record in this case demonstrates that Defendant provided the events of the week, culminating in the ultimate heat endurance challenge; that he encouraged participants to participate fully in the heat endurance challenge; that he provided the heat, the rocks, the steam and the exposure to the extreme heat; that he knew the participants were inside, and knew of their various states of distress; and that he did everything possible to encourage the victims to continue to participate in the heat endurance challenge, lasting over two hours, in spite of their obvious distress.

Defendant briefed the participants in advance of his event, telling them clearly and unequivocally that they would feel like they were going to die, but would not. Defendant knew participants would not rely on their own instincts as to the potential serious harm to themselves or others is evidence of his culpable mental state of recklessness. Defendant was "consciously disregarding a substantial and unjustifiable risk that the persons being exposed to intense heat and potentially fatal conditions would ignore their own physical symptoms (and the signs of distress in others) in reliance on the Defendant's assurances and in obedience to his directions during the ceremony." *Court's Ruling on Defendant's Motion to Exclude Audio Recordings of 2009 Spiritual Warrior Seminar Events, 2/28/11 at 2.*

Defendant's knowledge that his conduct created a substantial and unjustifiable risk of death is also proven by the "Spiritual Warrior Release, Waiver of Liability, Assumption of Risk, Indemnity Agreement and Disclaimer" that every participant was required to sign. This waiver,

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

that required every participant to release and discharge Defendant and his company from all liability for death sustained during the Spiritual Warrior 2009 event, undeniably demonstrates that Defendant knew of the substantial and unjustifiable risk of death his conduct created. This Waiver also clearly proves that Defendant knew that "people may have been seriously injured by participating in the Activities" and that the sweat lodge involved "tight, enclosed spaces and intense temperatures."

Defendant's knowledge that his conduct created a substantial and unjustifiable risk of death is conclusively proven by trial testimony that participants were passed out, unconscious, in trouble, and barely breathing inside his sweat lodge, that Defendant was told of their condition or knew of their conditions, and that he chose to continue to introduce more heat and steam, thereby causing their deaths. Finally, Defendant's conduct immediately following his heat event, his initial lack of alarm, his approval of Dennis Mehraver's experience, all prove he was aware of and consciously disregarded the substantial and unjustifiable risk of death his conduct created. Defendant's conduct immediately following also shows he intended consequences.

B. The evidence relating to the requisite mental state for manslaughter is equally relevant to the mental state for negligent homicide, an offense that is charged as a lesser-included under Rule 13.2(c), Ariz. R. Crim. P.

In considering the sufficiency of the State's evidence in the context of a Rule 20, this Court should also find the evidence is more than sufficient to support a conviction for the lesser included offense of negligent homicide. Pursuant to Rule 13.2(c), Ariz. R. Crim. P., when a defendant is charged with manslaughter he is also charged with the necessarily included offense of negligent homicide. Specifically the Rule states: "Specification of an offense in an indictment, information or complaint shall constitute a charge of that offense and of all offenses necessarily included therein." Rule 13.2(c), Ariz. R. Crim. P. As the comment to the rule explains:

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

> This provision is intended as a solution to the ambiguities caused by "open" charges--*i.e.,* charges which do not specify the degree of a crime charged--***by requiring the prosecutor to specify only the most serious degree, and automatically including all necessarily included offenses within the charge.*** This also clarifies the prosecutor's right to request instructions as to necessarily included offenses.

Comment to Rule 13.2, Ariz. R. Crim. P. (emphasis added).

It is clear that negligent homicide is a lesser-included offense of manslaughter. *State v. Parker,* 128 Ariz. 107, 109, 624 P.2d 304, 306 (App. 1980), *vacated in part on other grounds by State v. Parker,* 128 Ariz. 97, 624 P.2d 294 (1981). "[T]he only difference between manslaughter and negligent homicide is an accused's mental state at the time of the incident." *State v. Fisher,* 141 Ariz. 227, 247, 686 P.2d 750, 770 (1984) (citing *Parker, supra). See also State v. Montoya,* 124 Ariz. 155, 157, 608 P.2d 92, 94 (App. 1980); *State v. Walton,* 133 Ariz. 282, 291, 650 P.2d 1264, 1273 (App. 1982) ("Negligent homicide is distinguished from reckless manslaughter in that for the latter offense, the defendant is aware of the risk of death and consciously disregards it, whereas, for the former offense, he is unaware of the risk.").

Rule 13.2 is "permissive, not prohibitive. It allows the State to charge only the greater offense and relieves the State of any obligation to expressly charge the lesser." *Merlina v. Jejna,* 208 Ariz. 1, 3, 90 P.3d 202, 204 (App. 2004). *See also Parker, supra,* 128 Ariz. at 109, 624 P.2d at 306 (specification of the manslaughter offense constituted a charge of "all offenses necessarily included therein."). "Moreover, lesser-included and greater offenses must both be submitted to the jury under Rule 13.2." *Merlina, supra,* 208 Ariz. at 4, 90 P.3d at 205.

It is properly left to the jury to decide whether the evidence presented by the State supports the lesser charge only or the greater charge. *State v. Schwartz,* 14 Ariz.App. 531, 534, 484 P.2d 1060 (App. 1971); *State v. Scott,* 118 Ariz. 383, 386, 576 P.2d 1383, 1386 (App. 1978) (Although appellant could not be punished for both violations, "the State was not required to

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

make an election as to which charge to prosecute.") The mental states for negligent homicide and manslaughter lie along a continuum of *mens rea*. Arizona Revised Statute § 13-202(C) states that "[i]f a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts intentionally, knowingly or recklessly." "[U]nder A.R.S. § 13-202(C) a person who recklessly causes the death of another also acts with criminal negligence." *State v. Parker,* 128 Ariz. 107, 109, 624 P.2d 304, 306 (App. 1980), *vacated in part on other grounds by State v. Parker,* 128 Ariz. 97, 624 P.2d 294(1981). The mental states are interrelated, in effect; the lower mental states may be viewed as building blocks to the greater. The State has presented substantial evidence to show Defendant acted recklessly. In doing so, it has necessarily presented the evidence that Defendant acted with criminal negligence.

IV. Causation

A. The Law

1. "But for" Defendant's conduct, the three victims would not have died.

Arizona Revised Statutes § 13–203 provides:

> A. Conduct is the cause of a result when both of the following exist:
> 1. But for the conduct the result in question would not have occurred.
> 2. The relationship between the conduct and result satisfies any additional causal requirements imposed by the statute defining the offense.
> . . .
> C. If recklessly or negligently causing a particular result is an element of an offense, and the actual result is not within the risk of which the person is aware or in the case of criminal negligence, of which the person should be aware, that element is established if:
>
> 1. The actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the injury or harm intended or contemplated would have been more serious or extensive than that caused; or
>
> 2. The actual result involves similar injury or harm as the probable result and occurs in a manner which the person knows or should know is rendered substantially more probable by such person's conduct.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

"In Arizona, both "but for" causation and proximate cause must be established in a criminal case. *State v. Lawson,* 144 Ariz. 547, 559, 698 P.2d 1266, 1278 (1985). To establish legal cause, or cause-in-fact, there must be some evidence that but for defendant's conduct, the accident and resulting death would not have occurred. A.R.S. § 13–203(A)(1); *State v. Wiley,* 144 Ariz. 525, 540, 698 P.2d 1244, 1259 (1985); W. LaFave & A. Scott, Jr., *Handbook on Criminal Law* 249 (1979)." *State v. Marty*, 166 Ariz. 233, 236, 801 P.2d 468, 471 (App 1990) (cited footnote omitted).

The standard jury instruction on causation provides:[6]

> Conduct is the cause of a result when both of the following exist:
>
> 1. But for the conduct the result in question would not have occurred.
> 2. The relationship between the conduct and result satisfies any additional causal requirements imposed by the definition of the offense.
>
> In order to find the defendant guilty of [the crime], you must find that the [death] [injury] was proximately caused by the acts of the defendant.
>
> The proximate cause of a [death] [injury] is a cause which, in natural and continuous sequence, produces the [death] [injury], and without which the [death] [injury]would not have occurred.
>
> Proximate cause does not exist if the chain of natural effects and cause either does not exist or is broken by a superseding intervening event that was unforeseeable by the defendant and, without the benefit of hindsight, may be described as abnormal or extraordinary.
>
> The State must prove beyond a reasonable doubt that a superseding intervening event did not cause the [death] [injury].

2. Proximate cause

"Proximate cause requires that the difference between the result intended by the defendant and the harm actually suffered by the victim 'is not so extraordinary that it would be

[6] Revised Arizona Jury Instructions (RAJI) (3rd), Statutory Criminal Instruction 2.03.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

unfair to hold the defendant responsible for the result.'1 W. LaFave & A. Scott, *Substantive Criminal Law,* § 3.12 at 390 (1986)." *State v. Marty, supra,* 166 Ariz. 233, 237, 801 P.2d 468, 472.

3. Superseding intervening event

An intervening event qualifies as a superseding cause excusing the defendant from criminal liability only if it is both "unforeseeable and, with benefit of hindsight, abnormal or extraordinary." *State v. Bass*, 198 Ariz. 571, ¶13, 12 P.3d 796 (2000) (eliminating distinction between coincidental and responsive events and holding the tort standard for superseding cause applies in criminal cases). Arizona courts take a "broad view of the class of risks and victims that are foreseeable and the particular manner in which the injury is brought about need not be forseeable." *Tellez v. Saban,* 188 Ariz. 165, 172, 933 P.2d 1233, 1240 (App. 1996) (citation omitted). An intervening event is not a superseding cause "if the original actor's negligence creates the very risk of harm that causes the injury." *State v. Slover*, 220 Ariz. 239, 243, 204 P.3d 1088, 1093 (App. 2009) (quoting from *Young v. Envtl. Air Prods., Inc.,* 136 Ariz. 206, 212, 665 P.2d 88, 94 (App.1982), *modified on other grounds and aff'd,* 136 Ariz. 158, 665 P.2d 40 (1983)). An intervening event is not "a superseding cause when the defendant's conduct 'increases the foreseeable risk of a particular harm occurring through ...a second actor.'" *Id.* quoting from *Ontiveros v. Borak,* 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983).

In *State v. Slover*, 220 Ariz. 239, 204 P.3d 1088 (App. 2009), the Arizona Court of Appeals addressed the issue of causation and superseding intervening events. Slover, the driver of a pickup truck whose blood alcohol concentration was found to be 0.165, was driving on a rural highway at night in Gila County when he left the road, rolled down an embankment and landed on the hood and roof on the vehicle in a shallow creek. Slover's passenger was found dead, lying

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

in the creek with his head submerged in the water. Slover was charged with Manslaughter and two counts of DUI. At trial, the defendant hired the Chief Medical Examiner of Yavapai County who disagreed with the State's medical examiner on whether the passenger was unconscious when he suffocated. Both medical experts agreed the cause of the passenger's death was asphyxiation caused by drowning and blunt injuries of the head. The State's medical examiner who performed the autopsy concluded the cause of the drowning was loss of consciousness due to the head injury; the defendant's medical expert concluded it was possible the passenger's BAC was high enough that it prevented him from taking his head out of the water where, although conscious, he drowned. The jury found Slover guilty of two counts of DUI and Negligent Homicide.

Slover argued his conduct, the crash, did not cause the death of the passenger and that no definitive evidence proved the crash rendered the passenger unconscious. Slover further argued the victim could have crawled out of the truck and into the water where by reason of his intoxication, he was unable to remove himself and drowned. The trial court found it irrelevant whether the victim had gotten out of the truck on his own or been ejected, because it was Slover's actions had placed the victim "in a situation where reasonably he could not have extracted himself." *Id.* at 244, 204 P.2d at 1093. In rejecting the defendant's request for an instruction on superseding cause, the trial court stated "'it's certainly foreseeable that you go down a relatively steep and long hill ... that there would be a canyon there, and ... that there would be water there.'" *Id.*

On appeal, the *Slover* court addressed the issue of superseding causes of death and the foreseeable chain of events set in motion by the defendant's conduct. "Slover's conduct of driving while intoxicated was the very reason the victim had ended up near or in a creek, intoxicated,

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

with head injuries, and, at the very least, increased the foreseeable risk that the victim would die in the accident." *Id.* at 244, 204 P.2d at 1093. The court cited both *Rourk v. State*, 170 Ariz. 6, 12, 821 P.2d 273, 279 (App.1991) and *State v. Vandever*, 211 Ariz. 206, ¶ 8, 119 P.3d 473, 475 (App. 2005) wherein the conduct of the defendant-driver created the foreseeable risk of collision even though the exact details were unknown.

4. Causation – Multiple Actors

RAJI jury instruction 2.03.03, Causation (Multiple Actors) states:

> The unlawful acts of two or more people may combine to cause the [death] [injury] of another. If the unlawful act of another person was the sole proximate cause of the [death] [injury], the defendant's conduct was not the proximate cause of the [death] [injury]. If you find that the defendant's conduct was not a proximate cause of the [death] [injury], you must find the defendant not guilty.

In *State v. Bass*, 198 Ariz. 571, 12 P.3d 796 (2000), the defendant was convicted of various counts of manslaughter, endangerment and aggravated assault, predicated on her reckless driving, including her excessive speed and her actions of weaving in and out of traffic. At trial, and on appeal from her convictions, the defendant argued she was not reckless and that the intervening acts of others broke the chain of causation. At the time of the offenses, the defendant was seen driving at high rate of speed on Baseline near 24th street in Phoenix when she swerved to avoid the driver in front of her who changed lanes into her lane. The defendant reacted by swerving right and riding the curb. The defendant's passenger then grabbed the steering wheel and jerked it left. The defendant lost control of her vehicle, spun across the center lane into oncoming traffic and causing a severe multi-car collision, killing one person and injuring others.

At trial, the defendant argued the driver who changed lanes and her passenger who grabbed the wheel were both intervening events that were superseding causes that broke the chain of causation and excused her from criminal liability. The trial court gave the jury instruction on

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

superseding cause. Eliminating any previous distinction in criminal cases between "coincidental" and "responsive" intervening acts, the Court found the jury was properly instructed on causation. "Our criminal standard for superseding cause will henceforth be the same as our tort standard. *See Petolicchio v. Santa Cruz County Fair and Rodeo Ass'n Inc.,* 177 Ariz. 256, 866 P.2d 1342 (1994); *State v. Bass, supra,* 198 Ariz. 571, 576, 12 P.3d 796, 801.

In *State v. Cocio*, 147 Ariz. 277, 709 P.2d 1336 (1985), the defendant was convicted of manslaughter and driving under the influence after a collision in Tucson wherein the defendant's truck collided with another at an intersection, causing the death of the passenger in the second truck. The defendant's blood alcohol concentration was 0.29. The Arizona Supreme Court rejected the defendant's argument on appeal that the "sole cause" instruction should not have been given to the jury.

> Subsection (A) sets out the basic causation requirements for any crime. Subsection (A)(2) requires any causal requirements of the statute defining the offense, here manslaughter § 13–1105, to be met. In our case, the conduct-result relationship was set out by the manslaughter instruction (# 6) which required that defendant be aware of and consciously disregard a substantial risk that his conduct will result in the death of another person. Subsection (C) of § 13–203 only comes into play when "the actual result is not within the risk of which the person is aware." In the case at bar, the record demonstrates that the risk of which defendant was aware was the oncoming Rodriguez vehicle colliding with his truck. Defendant himself testified that he saw the Rodriguez vehicle coming down the roadway about five seconds before the collision occurred. Defendant also indicated that he did not stop in the left hand turn lane but continued crossing the path of the oncoming Rodriguez vehicle which came at him at a high rate of speed. Thus, an instruction pursuant to A.R.S. § 13–203(C)(2) would have been inappropriate.

Id. 147 Ariz. at 280, 709 P.2d at 1341.

In *State v. Sucharew*, 205 Ariz. 16, 66 P.3d 59, (App. 2003), the defendant and a friend were drag racing when the defendant collided head-on into the victim's car, killing the victim. At trial, the defendant argued it was not his intoxication or speeding that caused the victim's death, but (1) the scare tactics and speeding of his friend from whom the defendant was speeding away

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

to escape, and (2) the actions of the victim in "freezing" his vehicle on the roadway. The defendant was found guilty of 2nd degree murder and leaving the scene. On appeal, the Court found the jury had been properly instructed on issue of causation.

The State agrees that voluntary acts of a person, such as suicide or knowingly assuming a risk absent assurances of safety or assistance, can be superseding intervening acts that break the chain of proximate cause, depending upon the facts of each individual case. However, Defendant incorrectly cites certain cases, as explained below, in a manner that could mislead the Court.

Defendant cites *Lewis v. State*, 474 So.2d 766 (Ala.Crim.App 1985), as a case where the court found "defendant not guilty of negligent homicide for victim's death in a game of Russian Roulette." *Defendant's Motion, p. 34.* In fact, the court in *Lewis* specifically stated that a defendant *can be held criminally responsible* for his conduct in playing Russian Roulette with another who dies. The evidence in *Lewis* was clear that the victim committed suicide, while alone, sometime after he and the defendant had played Russian Roulette, perhaps with an unloaded gun. Noting that the "the key is the appellant's presence at the time the victim shot himself," the court held: "[i]f the victim had shot himself while he and the appellant were playing Russian Roulette, or if the appellant was present when the victim was playing the game by himself, *the appellant's conduct of influencing the victim to play would have been the cause-in-fact and the proximate cause of the victim's death.*" *Id.* at 771 (emphasis added).[7]

[7] The facts in *Lewis* bear discussion. In *Lewis,* the 15 year old victim had been present earlier in the week when the defendant played Russian Roulette with a loaded gun with his brother. Earlier in the day of the victim's death, the defendant and the victim had played Russian Roulette, although the evidence was unclear whether the gun was loaded. When the "game" was over, the defendant put the gun away. Later, the victim, now alone, was seen holding the gun, spinning the chamber; a few minutes later, a gunshot was heard. The coroner testified the gunshot appeared to be self-inflicted and the court concluded "[t]he evidence is clear that the deceased either committed suicide or fell victim to an unfortunate misadventure." *Id.* at 770. The State contended the defendant's acts were the proximate cause and the cause in fact of the victim's

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Defendant also cites *Lemos v. Madden, et al.,* 200 P. 791 (Wyo. 1921), erroneously stating it is a case where "plaintiff's deliberate decision to attempt to save defendants' sheep in dangerous conditions was superseding cause of his injuries." *Defendant's Motion,* p. 34. In fact, the Wyoming Supreme Court *reversed* the trial court grant of demurrer (i.e. summary judgment) in favor of the defendant and sent the case back to the trial court for further proceedings. The trial court had found that the defendant's alleged negligence – failing to furnish fuel and comforts to the plaintiff at his camp – was not the proximate cause of plaintiff's injuries (severely frozen feet) in light of intervening acts – a cold storm, the plaintiff act in going to bed, the straying away of the sheep from the camp, and the plaintiff's decision to go out into the storm to find the sheep, and the plaintiff's exposure to the storm that caused his feet to freeze. The Supreme Court of Wyoming *reversed* the grant of demurrer, stating principles of causation in its opinion. Noting that the evidence showed that the plaintiff knew of the danger of the storm on the range, the Wyoming Supreme Court stated: ". . . plaintiff knew the danger, *and, in the absence of the expectation of help and protection on the range, fully appreciated it,* in which case he must be held to have assumed it." *Id.* at 799. *(emphasis added)*

Of particular note to the case at bar is the Wyoming Supreme Court's observations that the plaintiff's appreciation of the danger and a defendant's assurances of safety are facts to be considered in determining whether a party has assumed a risk. "But, on the other hand, if the plaintiff was promised help and protection on the range during the storm, or other facts should

---

death, arguing the victim would not have killed himself if the defendant had not "directed, instructed and influenced" him to play the game, and that defendant should have been aware of the risk the victim might later kill himself by playing the game alone. *Id.* at 770-771. The court disagreed with this theory. "Even though the victim might never have shot himself in this manner if the appellant had not taught him to play Russian Roulette, we cannot say that the appellant should have perceived the risk that the victim would play the game by himself or that he intended for him to do this." *Id.* at 771.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

appear that may have reasonably warranted the plaintiff in facing the danger, then we cannot say as a matter of law that plaintiff assumed the risk. The argument on that point need not be repeated here. We held in *Boatman v. Miles, supra*, that assurances of safety were facts to be considered in determining whether the plaintiff assumed the risk." *Id.* at 800.

Defendant cites *Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439 (7th Cir. 2009), for the general proposition that a decedent's suicide is a "superseding cause." *Defendant's Motion, p. 34.* To the extent Defendant is arguing the victims committed suicide, this Court must reject that argument; there is no evidence to support that patently offensive theory. Of relevance in the *Johnson* case are the legal principles that "suicides [are] intervening acts that break the causal chain because of their *presumptively unforeseeable nature*," and that "[w]hat is the proximate cause of an injury is ordinarily a question of fact to be determined *by a jury* from a consideration of all of the evidence." *Id.* at 443 (citations omitted, emphasis added).

5. Assurances of safety, promises of assistance, presumptively unforeseeable acts such as suicide.

Defendant's actions placed the victims in a situation where they suffered extreme altered mental status and from which they could not reasonably extract themselves. Defendant's conduct is the very reason the victims were in the super-heated tent with altered mental status, and at the very least, increased the foreseeable risk that they would die if not removed and immediately cooled down. Trial witnesses testified they trusted Defendant, trusted that he would keep them safe, and that Defendant had told them they would be taken out of the tent if they passed out. Given Defendant's assurances for their safety and promises of assistance to participants should they pass out inside his sweat lodge, there is no basis for the argument that the decedents' "free will" was a superseding intervening cause of death.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

B. Duty

1. No Breach of Duty is Required to Establish Defendant is Guilty of Manslaughter

Arizona Revised Statutes §13-201 establishes the minimum requirements for a criminal conviction. Specifically, to be guilty of an offense, a person must either: 1) perform conduct which includes a voluntary act, or 2) omit to perform a duty imposed by law which the person is physically capable of performing. A.R.S. §13-201. Conduct is defined as an act **or** an omission and its accompanying culpable mental state. A.R.S. §13-105(6). As discussed in the State's March 21, 2011 Memorandum Re: The Issue of Whether the State Must Establish Defendant Breached a Duty (which is incorporated herein by this reference), the State is not required to prove Defendant breached a legal duty, provided Defendant's affirmative conduct caused the victims' deaths.

Defendant's Rule 20 Motion erroneously argues that Defendant's *conduct* (including ordering more hot rocks into the lodge after each round, ordering more water to be brought into the lodge after each round, pouring water onto the hot rocks after each round to create steam, telling participants to ignore the problems with Liz Neuman because "she has done this before," telling participants to leave Kirby Brown inside because "the door is closing, the next round is beginning," conducting additional rounds after unconscious participants were dragged past Defendant, determining and controlling the length of rounds, and determining and controlling the interludes between rounds) is actually an *omission*. All of the foregoing are bodily movements, which are "acts" as that term is defined. A.R.S. § 13-105(2). Unlike *State v. Moran*, 162 Ariz. 524, 784 P.2d 730 (App. 1989), and the other cases cited by Defendant which involved a defendant's failure or refusal to engage in conduct, the case at bar involves Defendant's affirmative actions.

Defendant's Rule 20 Motion labels Defendant's conduct as "background acts" that are "wholly subsidiary to the omissions the State has alleged." Defendant's Motion offers no legal support for the proposition that a defendant's affirmative acts cannot form the basis of criminal

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

liability. The Rule 20 Motion argues that *a failure to stop* engaging in affirmative conduct is the equivalent of an omission. It is not. Failing to stop engaging in affirmative conduct is merely a continuation of affirmative conduct, and is not an omission.[8]

2. Defendant Owed a Duty to Liz Neuman, Kirby Brown, and James Shore

Defendant owed a common law duty towards the victims. Although Arizona has abolished common law offenses, a defendant's violation of a common law duty may give rise to criminal liability under the negligent homicide or manslaughter statutes. *State v. Brown,* 129 Ariz. 347, 631 P.2d 129 (App. 1981); *accord State v. Far West Water & Sewer, Inc.*, 224 Ariz. 173, 228 P.3d 909 (App. 2010).

In *Brown,* a defendant who ran a boarding home was charged with manslaughter and negligent homicide after neglecting to provide adequate care to an infirm boarder, and after continuing to house the boarder in violation of a court's order to cease providing care and boarding to the boarder. *Brown* recognized that criminal liability can arise based on duties recognized by the Restatement (Second) of Torts, and a portion of the jury instruction defining the duty owed by the defendant was taken directly from the Restatement. *Id.* at 350, 631 P.2d at 132. In discussing the issue of duty in connection with a criminal defendant's failure to act, *Brown* opined, "LaFave and Scott, in their work, suggest three other duties: The duty based upon *creation of the peril,* the duty to control the conduct of others and the duty of a landowner to act

[8] The fallacy of Defendant's attempt to characterize acts as omissions can be seen in a hypothetical situation where a defendant is confronted by a victim and legitimately strikes the victim in self-defense. Provided the victim no longer presents a threat to the defendant after the first blow, he cannot continue striking the victim. If after the first, lawful blow, a defendant continues to strike the victim, he can be held criminally liable for his affirmative conduct of continuing to strike the victim. It would be nonsense in such a case to argue the defendant was being prosecuted for an *omission* (i.e. for failing to stop striking the victim) rather than prosecuted for his affirmative conduct in continuing to strike the victim.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

affirmatively to provide for the safety of those whom he invites on to his land. LaFave and Scott, Criminal Law, Sec. 26 (1972)." *Id.* (emphasis added).

The creation of peril duty owed by Defendant to Liz Neuman, Kirby Brown, and James Shore is set forth in §322 of the Restatement (Second) of Torts. Section 322 of the Restatement provides that, "**[i]f the actor knows or has reason to know that by his conduct, whether tortuous or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.**" (emphasis added). The creation of peril duty set forth in Section 322 of the Restatement (Second) of Torts has been adopted in Arizona. *Maldonado v. Southern Pacific Transportation Company*, 129 Ariz. 165, 168, 629 P.2d 1001, 1004 (App. 1981); *La Raia v. Superior Court in and for Maricopa County*, 150 Ariz. 118, 121-122, 722 P.2d 286, 289-290 (1986).

Maldonado dealt with a situation where a man was injured while trying to board a train. 129 Ariz. 165, 629 P.2d 1001. Railroad employees jerked the train as the man was climbing onto the train, causing the man to fall under the train's wheels. *Maldonado* expressly adopted Section 322 of the Restatement (Second) of Torts as creating a duty based upon a defendant's creation of peril. *Maldonado* quoted the following language from the comments to §322:

> a. The rule stated in this Section applies not only where the actor's original conduct is tortious, but also where it is entirely innocent. If his act, or an instrumentality within his control, has inflicted upon another such harm that the other is helpless and in danger, and a reasonable man would recognize the necessity of aiding or protecting him to avert further harm, the actor is under a duty to take such action even though he may not have been originally at fault. This is true even though the contributory negligence of the person injured would disable him from maintaining any action for the original harm resulting from the actor's original conduct.
>
> b. The words 'further harm' include not only an entirely new harm due to the dangerous position in which the other has been placed by the actor's tortious act ... but also any increase in the original harm caused by the failure to give assistance ... and any protraction of the harm which prompt attention would have prevented .... (illustrations omitted)

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

> c. Where the original conduct is tortious, the duty stated in this Section frequently is unnecessary to the existence of liability for the further harm, since the connection between the original wrong-doing and the further harm is usually such as to make the actor's conduct in law the cause of such harm. However, a failure to perform the duty here stated creates liability even though the actor's original misconduct is not the legal cause of the further harm.
>
> d. Effect of other's contributory negligence. (emphasis in original) The liability which this Section recognizes is not imposed as a penalty for the actor's original misconduct, but for a breach of a separate duty to aid and protect the other after his helpless condition caused by the actor's misconduct is or should be known. It is therefore immaterial that the accident which rendered the other helpless to care for himself was caused by his own contributory negligence as well as by the actor's misconduct, so that he cannot recover for the original injury, nor, apart from the duty stated in this Section, for any further harm which he suffers in consequence of it, although the actor's tortious conduct was undoubtedly the legal cause thereof.

Id. at 168, 629 P.2d at 1004.

Maldonado cited with approval the following holding from *Tubbs v. Argus*, 140 Ind.App. 695, 225 N.E.2d 841, 843 (1967), which was premised on §322 of the Restatement: "... It is the opinion of this Court that an affirmative duty to render reasonable aid and assistance is not limited to those cases involving the flow of an economic advantage to the alleged defendant..... it is the opinion of the Court that the case at bar presents a situation in which an affirmative duty arises to render reasonable aid and assistance to one who is helpless and in a situation of peril, when the injury resulted from **use of an instrumentality under the control of the defendant**." *Id.* at 168 – 169, 629 P.2d 1001, 1004 - 1005 (emphasis added).

Comment A to the §322 of the Restatement (which was cited with approval by *Maldonado*), and *Tubbs,* make it clear that a defendant's duty arises when the condition of peril is created by the defendant's act **or by an instrumentality within his control**. Thus, if the jury determines the sweat lodge (which was under Defendant's control) caused the victims to become helpless and in danger, and the jury determines a reasonable person should recognize the

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

necessity of aiding or protecting the victims to avert further harm, Defendant's duty to the victims arises, even if the condition of peril arose from something in the lodge other than heat and humidity (such as carbon dioxide, organophosphates in the lodge's material, etc.). Comment A makes it clear the duty is imposed even if the defendant was not originally at fault.

La Raia v. Superior Court in and for Maricopa County, 150 Ariz. 118, 722 P.2d 286 (1986), involved a landlord who caused a tenant's apartment to be sprayed with toxic bug poison. The tenant became ill from exposure to the poison. The Arizona Supreme Court, relying upon *Maldonado, supra,* 129 Ariz. 165, 629 P.2d 1001, 100, expressly adopted §322 of the Restatement (Second) of Torts, and held the landlord was under a duty to reasonably act to mitigate the resulting harm to the tenant. *La Raia , supra*, 150 Ariz. 118, 122, 722 P.2d 286, 290.

3. Defendant Breached His Duty to Liz Neuman, Kirby Brown, and James Shore

The State has met its burden of proving that Defendant owed and breached a duty based upon the creation of peril. As discussed in the causation section of this response, Defendant's conduct created the situation of peril inside the sweat lodge by exposing Liz Neuman, Kirby Brown, and James Shore to excessive heat for a long duration. For purposes of determining whether or not Defendant created the situation of peril inside the lodge, it is immaterial whether or not his doing so was originally tortious or innocent. *Maldonado, supra,* 129 Ariz. 165, 168, 629 P.2d 1001, 1004.

The jury has been provided with substantial evidence surrounding the conditions of peril inside the sweat lodge. The jury has been provided with substantial evidence that this condition of peril inside the sweat lodge caused bodily harm (loss of consciousness and heat-related illness) to the three victims to such an extent as to make the victims, and each of them, helpless (unconscious) and in danger of further harm (death). The jury has been provided with substantial

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

evidence that Defendant was aware of the conditions inside the sweat lodge and aware of the fact that the victims were in trouble, unconscious or not breathing, and failed to exercise reasonable care to prevent the victims from suffering any further harm or death. The jury has been provided with substantial evidence that Defendant was alert during the sweat lodge ceremony, was capable of talking throughout the ceremony, and capable of exiting and walking from the lodge at the end of the ceremony, thereby allowing reasonable jurors to conclude Defendant was physically capable of performing his duty towards Liz Neuman, Kirby Brown, and James Shore.

4. Imposing the Creation Of Peril Duty On Defendant Does Not Violate Defendant's Due Process Rights

Defendant's Rule 20 Motion argues that to allow the case to proceed to the jury would require the Court to create a new duty, and that doing so would violate Defendant's right to Due Process. As noted above, the creation of peril duty set forth Section 322 of the Restatement (Second) of Torts has been recognized in Arizona since *Maldonado* was decided thirty years ago. *Maldonado, supra,* 129 Ariz. 165, 629 P.2d 1001. Indeed, in *La Raia v. Superior Court in and for Maricopa County, supra,* 150 Ariz. 118, 722 P.2d 286, the Arizona Supreme Court recognized that the duty created by Section 322 was not a new duty, but had been applied in Arizona since *Maldonado.*

Likewise, for at least thirty years, Arizona has also recognized that a defendant's violation of a common law duty can create criminal liability under the negligent homicide and manslaughter statutes. *State v. Brown,* 129 Ariz. 347, 631 P.2d 129 (App. 1981); *accord State v. Far West Water & Sewer, Inc.*, 224 Ariz. 173, 228 P.3d 909 (App. 2010).

Defendant's reliance on *State v. Angelo*, 166 Ariz. 24, 800 P.2d 11, 12 (App. 1990), is misplaced. *Angelo* held that A.R.S. §13-306 imposed criminal liability upon a corporate employee only when there was affirmative illegal conduct by a corporate employee, and not when

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

the corporate employee failed to comply with a corporation's statutory duty. Likewise, the other cases cited by Defendant in support of the alleged due process violation similarly fail for the reason that the creation of peril duty has long been the law of the land in Arizona, and therefore provides the fair notice that due process requires.

V. Gross deviation from the standard of conduct of a reasonable person

Defendant cites *In re William G., supra,* 192 Ariz. 208, 963 P.2d 287, in support of his argument that his behavior constitutes nothing more than civil negligence. In *William G.,* a juvenile had been charged with criminal damage based on his conduct riding a shopping cart in a parking lot and hitting a parked care. The court distinguished civil negligence, in which a party is unaware of potential results, from recklessness, in which a party is "aware of and consciously disregard[s] the risk his conduct is creating" and held that the juvenile was not criminally reckless. *Id.* at 213, 963 P.2d at 292. Defendant's conduct in this case is clearly not comparable to the conduct of a 15 year old joyriding shopping carts in a parking lot.

The court in *William G.* defined gross deviation as follows: "One authority offers this relevant definition of gross: 'flagrant and extreme.' *Random House Unabridged Dictionary* 842 (2d ed.1993). Synonyms include: 'outrageous, heinous, grievous.' *Id.* While this etymological reference is not clearly definitive, it does season the term "gross" with sufficient semantic flavor to cause us to conclude that the deviation from acceptable behavior required for recklessness must be markedly greater than the mere inadvertence or heedlessness sufficient for civil negligence." *William G.,* 192 Ariz. at 293, 963 P.2d at 294.

Without citing any legal support, Defendant urges this Court to ignore the clear language of A.R.S. §13-105(c) and find that the reasonable person standard should be determined by the conduct of the participants, the very people who fell ill and died. Arizona Revised Statutes §13-

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

105(c) clearly indicates the standard of the conduct is what "a reasonable person would observe in the situation," not the conduct of the very people whose mental status was intentionally altered by Defendant.

Based on the evidence discussed above, a reasonable juror can find that Defendant was aware of and consciously disregarded a substantial and unjustifiable risk to life that his conduct created. Similarly, a reasonable juror can find that Defendant's actions constitute a gross deviation from the standard of conduct of a reasonable person facilitating a sweat lodge ceremony, or otherwise introducing heat to an enclosed tight space would observe. *See also State v. Miles,* 211 Ariz. 475, 482, 123 P.3d 669, 676 (App. 2005), *review denied 2006* (evidence was sufficient to support a finding of defendant's recklessness who drove a truck through a stop sign and collided with another; where defendant had failed to stop at a clearly visible stop sign and had entered the intersection with tires screeching and this conduct constituted gross deviation from conduct a reasonable person would observe in a similar situation); *In the Matter of the Appeal in Navajo County Juvenile Delinquency,* 164 Ariz. 389, 793 P.2d 146 (App. 1990) (hurling of water balloons at fast-moving vehicles travelling on state highways constitutes gross deviation from the standard of conduct a reasonable person would exercise).

Looking at the entire record, and viewing the evidence in the light most favorable to the prosecution, it is also clear that Defendant's conduct was a gross deviation from the standard of conduct that a reasonable person would observe in that situation. Defendant kept the heat endurance challenge a surprise for most of the participants (although some knew it was coming), and told them of the event for the first time about one hour prior to its commencement. The only preparation Defendant provided was his pre-event briefing during which he described for

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

participants all the signs and symptoms of heat-related illness, told them to ignore these signs and told them it was safe to do so.

The uncontested testimony of Dr. Dickson, the State's medical expert, was that a person should prepare oneself prior to participating in an event that involves exposure to an enclosed, extreme heat environment for over two hours. Dr. Dickson testified that a participant should take time to acclimate to the heat; should get plenty of sleep and be well-rested; should be in top physical condition; should not fast prior to the event because it weakens the person; should be well-hydrated in advance of exposure and hydrate continuously throughout the event; should be educated on the signs and symptoms of heat-illness; should get out of the heat and immediately cool off *before* experiencing a change in mental status, the hallmark of heat exhaustion; and should employ a "buddy system," looking out for the health of one another, and especially any changes in the mental status.

The uncontested trial testimony has established that not only were participants *not* adequately warned about the heat endurance challenge so they could adequately prepare, but Defendant intentionally weakened them in advance by subjecting them to a 36 hour fast from food and water, leaving them hungry and dehydrated, advised them to forego sleep throughout the week, did not allow them to hydrate throughout the heat event unless they left the tent, intentionally educated them to ignore the warnings of heat illness and that the signs and symptoms they would experience during the event were to be expected, welcomed and endured, encouraged the participants to "let others have their own experience" and not interfere, and that rather than recognize the altered mental status as a hallmark of heat exhaustion, it was safe to ignore it and continue on.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

According to the uncontested testimony of Melinda Martin, Dream Team members were hired based on how easy they were to get along with. Neither Dream Team nor staff was trained in any specific safety measures to assist participants in the heat endurance challenge, nor to recognize life-threatening signs and symptoms. As with the participants, Dream Team members were told by Defendant that it was okay to ignore the signs and symptoms of heat illness.

Defendant recklessly exposed the victims to extreme heat to create an altered state, telling the victims it was safe to ignore their own bodies' signs and symptoms of distress. He intended and exposed the victims to an enclosed, tight space with intense temperatures; he intended and added heated rocks and water to create super-heated steam between every round of eight rounds; and he intended and exposed the victims to the extreme heat, extreme steam and compromised air quality in the enclosed tight space for an extreme length of time. Defendant intended that the victims would experience physical effects and mental status changes from the heat and, specifically, that they would experience an altered mental status, including losing consciousness. Everything Defendant intended occurred – except for the deaths of the victims (if the evidence proved Defendant intended for the victims to die, it would support convictions for second degree murder):

VI. Prosecution does not violate Defendant's free speech.

Defendant's statements have been admitted because they are relevant and material to the facts of this case and the elements of the offenses charged. The use of this evidence does not violate Defendant's right to freedom of speech. In finding the audio clips from Spiritual Warrior 2009 relevant and admissible, this Court found that portions of the recordings were relevant for several reasons including Defendant's mental state. Specifically, this Court noted that the recordings arguably included "evidence indicating Defendant knew the sweat lodge participants

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

would rely on him to provide both guidance as to how to experience the seminar (and specifically the sweat lodge ceremony) and precautions regarding their safety." *Ruling on Defendant's Motion to Exclude Audio Recordings of 2009 Spiritual Warrior Seminar Events,* 2/28/11 at 2. This Court also found the recordings included "information showing that the participants followed the instructions given to them despite distress or discomfort." *Id.* In the ruling, this Court noted the following:

> As the State notes, the Court has previously discussed its conclusion regarding how the state of mind of an alleged victim can be relevant to a possible culpable mental state of a defendant. Evidence that the Defendant knew the people in the sweat lodge probably would not rely on their own instincts as to potential serious physical harm to themselves or others could be relevant to the culpable mental state of recklessness; the Defendant would arguably be consciously disregarding a substantial and unjustifiable risk that the persons being exposed to intense heat and potentially fatal conditions would ignore their own physical symptoms (and the signs of distress in others) in reliance on the Defendant's assurances and in obedience to his directions during the ceremony.

Id. This Court further noted that it did not conclude "that 'words of encouragement' alone could result in criminal liability," but "that words of encouragement (or instructions) combined with assurances regarding safety, when spoken in a context involving a legal duty, present a different circumstance." *Id.* at 3.

The recordings of the 2009 Spiritual Warrior Event provide relevant evidence relating to the mental states of both Defendant and the victims. They are also relevant to explain the conduct of the other participants in the sweat lodge. As discussed in section III(A) above, mental states can be established by circumstantial evidence. See *In re William G., supra,* 192 Ariz. 208, 213, 963 P.2d 287, 292 (App. 1997). Contrary to Defendant's argument, the admission of this evidence does convert a prosecution for manslaughter into a prosecution of Defendant's statements.

The First Amendment "does not prohibit the evidentiary use of speech to prove motive or intent." *Wisconsin v. Mitchell,* 508 U.S.476, 489, 113 S.Ct. 2194, 2201 (1993). "Evidence of a

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." *Id.* In *Haupt v. United States,* 330 U.S. 631, 67 S.Ct.874 (1947), the defendant was convicted of treason based in part on evidence of his past statements showing sympathy with Germany and with Hitler and hostility to the United States. *Id.* at 642, 67 S.Ct. at 879. In finding the statements admissible, the Court stated:

> Such testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government or quite proper appreciation of the land of birth. But these statements were explicit and clearly admissible on the question of intent and adherence to the enemy. Their weight was for the jury.

Id.

In *State v. Ochoa,* 189 Ariz. 454, 943 P.2d 814 (App. 1997), the Court of Appeals considered defendant's claim that A.R.S. § 13-105(8) relating to indicia of "'criminal street gang' membership describe[d] a form of expression protected by the First Amendment." *Id.* at 459, 943 P.2d at 819. Acknowledging that a statute is "constitutionally overbroad if it proscribes expression protected by the First Amendment," the Court of Appeals found that "[u]sing such evidence to establish a sentence enhancement **does not** violate the First Amendment." *Id.* at 819, 820, 943 P.2d at 459, 460 (emphasis in original). *See also Bird v. State,* 184 Ariz. 198, 908 P.2d 12 (App. 1995) (rejecting the plaintiff's claim that they were not being prosecuted for placing a bet on an election, but for publicizing the bet in the newspaper in violation of the First Amendment).

In *United States v. Curtin,* 489 F.3d 935 (9th Cir. 2007), the court considered whether the First Amendment precluded the admission of literature involving sexual activity between adults and children found in a defendant's possession to prove intent in a case involving charges of

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

traveling across state lines to have sex with a minor. The court noted that "the Supreme Court has held on many occasions in other contexts that opinions and other information that otherwise might be entitled to First Amendment protection are not immune from discovery and use as evidence in court, as long as they are relevant to an issue in a given case." *Id.* at 953-954.

After reviewing multiple Supreme Court opinions, including *Wisconsin v. Mitchell,* 508 U.S. 476, 113 S.Ct. 2194 (1993) (use of the defendant's speech to prove sentence enhancement for "hate crimes" did not violate First Amendment); *Herbert v. Lando,* 441 U.S. 153, 99 S.Ct. 1635 (1979) (First Amendment right to freedom of press did not preclude discovery of materials relating to editorial process and state of mind of publisher in libel suit; also noting that even the President does not have an absolute privilege against disclosure of materials (*citing United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090 (1974)); and *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646 (1972) (refusing to create a First Amendment free speech and free press privilege for reporters to protect sources from grand jury inquires), the *Curtin* Court concluded:

> Accordingly, if news reporters, newspapers, and television networks have no First Amendment privilege to withhold otherwise relevant evidence from the courts, and if the President of the United States himself is in the same constitutional boat, we do not believe that [the defendant] or anyone similarly situated can use the First Amendment or any other constitutional principle to exclude relevant evidence from the reach of Rule 401 or 404(b) on the specific ground that the evidence is "reading material" or literature otherwise within constitutional protection in another setting.

Curtin supra at 954-956.

Defendant's statements are relevant and material evidence in this case. The admission of the statements does not violate Defendant's First Amendment right to freedom of speech.

The cases cited by Defendant do <u>not</u> support his claim of a First Amendment violation. Specifically, the State notes the following:

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

In *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564. 573, 122 S.Ct. 1700 (2002), cited on page 44 of Defendant's Motion, the Supreme Court determined whether the Child Online Protection Act's (COPA's) "reliance on community standards to identify 'material that is harmful to minors'" rendered the statute overbroad for purposes of the First Amendment. *Id.* at 585, 122 S.Ct. at 1714. This case did not address in any form the admissibility of a defendant's statements in a criminal trial.

In *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780 (1971), cited on page 45 of Defendant's Motion, the defendant was prosecuted under a California statute prohibiting disturbance of the peace by offensive conduct for his act of wearing a jacket bearing offensive words in a courtroom where women and children were present. On review, the Supreme Court held that the state may not "make the simple public display here involved of this single four-letter expletive a criminal offense." *Id.* at 27, 91 S.Ct. at 1789. *Cohen* is clearly distinguishable from the instant case because the defendant's speech, and only his speech, was the basis of his prosecution.

In *United States v. Playboy Entertainment Group, Inc,* 529 U.S. 803, 120 S.Ct. 1878 (2000), cited on page 45 of Defendant's Motion, the Supreme Court considered a First Amendment challenge to Section 505 of the Telecommunications Act of 1996 designed to shield children from hearing or seeing sexually oriented programming through a phenomenon known as "signal bleed." *Id.* 120 S.Ct at 1882-1883. The court upheld the District Court's holding that the statute violated the First Amendment after finding the Government had failed to show Section 505 was "the least restrictive means for addressing a real problem." *Id.* 529 U.S. at 827. This case did not address in any form the admissibility of a defendant's statements in a criminal trial.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817 (1976), cited on page 45 of Defendant's Motion, the Supreme Court considered a First Amendment challenge to a Virginia statute declaring it unprofessional to advertise the prices of prescription drugs.[9] *Id.* at 749-750, 96 S.Ct. at 1819. The Court upheld the holding of the District Court declaring the relevant portion of the statute void and concluded that a state could not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773, 96 S.Ct. at 1831. This case did not address in any form the admissibility of a defendant's statements in a criminal trial.

In Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974), cited on page 45 of Defendant's Motion, the Supreme Court "granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen." *Id.* at 325-326, 94 S.Ct. at 3000. Again, this case did not address in any form the admissibility of a defendant's statements in a criminal trial.

In *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827 (1969), the defendant was prosecuted under a statute "which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action." *Id.* at 449, 89 S.Ct. at 1827. Although it involved a criminal prosecution, *Brandenburg,* like *Cohen, supra,* is clearly distinguishable, because the defendant's statements constituted the criminal act being prosecuted.

The other cases cited in Defendant's Motion and earlier pleadings are similarly distinguishable and not relevant to the instant case. The First Amendment "does not prohibit the

[9] Defendant's reference to this case includes a footnote number 19. Other than the referenced

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

evidentiary use of speech to prove motive or intent." *Wisconsin v. Mitchell,* 508 U.S.476, 489, 113 S.Ct. 2194, 2201 (1993). "Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." *Id.* Defendant's statements have been properly admitted in this case.

VII. State's Motion to re-open to address deficiencies found

Should this Court find the State has failed to establish all of the elements of the charged offenses, the State moves this Court to reopen its case-in-chief and present the necessary evidence. As this Court is aware, the State has greatly reduced the number of witnesses from its original witness list. This reduction was made for multiple reasons including unanticipated delays in the trial, greater than expected examinations of each witness, this Court's rulings excluding several of the State's expert witnesses, this Court's comments regarding cumulative evidence, and concerns regarding the jury's ability to remain empanelled past the original schedule. As a result, the State greatly limited the evidence it intended to present. Notwithstanding this reduction, the State believes it has presented substantial evidence that would allow a reasonable person to find Defendant guilty of manslaughter as detailed above. However, should this Court disagree, the State believes justice is served by allowing it to reopen its case and present additional evidence.

"Trial courts have broad discretion in deciding whether to reopen a case and admit additional evidence." *State v. Patterson,* 203 Ariz. 513, 514, 56 P.3d 1097, 1098 (App. 2003) *citing State v. Dickens,* 187 Ariz. 1, 12, 926 P.2d 468, 479 (1996). "In general, a 'trial court is not justified in closing the case until all evidence, offered in good faith and necessary to the ends of justice, has been heard, particularly where the plaintiff seeks to reopen *before the defense has presented any evidence* and where no surprise or prejudice would result therefrom.'" *Dickens,*

---

number, this footnote appears to have been omitted.

supra, quoting 75 AM.JUR. *Trial* § 387, at 584. (emphasis in original). "It does not constitute prejudicial error to permit the state to reopen its case where the defendant is not denied a full and fair opportunity to rebut the additional evidence." *State v. Cota,* 99 Ariz. 237, 241, 408 P.2d 27, 29 (1965). *Cf. State v. Cousins,* 4 Ariz.App.318, 324, 420 P.2d 185, 191 (1966) (When State rests with knowledge of a major variance that forces a defendant into a tactical decision, it is an abuse of discretion to allow the State to reopen to fix the variance.) "The purpose of permitting a party to reopen and present further evidence is 'to promote justice, not thwart it.'" *Dickens, supra,* 187 Ariz. at 13, 926 P.2d at 480, *quoting Cota, supra,* 99 Ariz. at 240, 408 P.2d at 28.

RESPECTFULLY submitted this 6th day of June, 2011.

By _____
SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

COPIES of the foregoing emailed this 6th day of June, 2011:

Hon. Warren Darrow
Dtroxell@courts.az.gov

Thomas Kelly
tkkelly@thomaskellypc.com

Truc Do
Tru.Do@mto.com

By: _____

COPIES of the foregoing delivered this 6th day of June, 2011, to

Thomas Kelly
Via courthouse mailbox

Truc Do
Munger, Tolles & Olson LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

By: _____

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

James Ray:

1

So the question is not whether you're going to physically die. The question always is how did you live? So you're going to have an opportunity this afternoon to once again partake in a tradition. A sacred ceremony and a practice that is as old as time itself. A tradition that interestingly enough is properly understood a death and rebirth experience. And a way for you to prove to yourself and to prove to the universe that you're willing to do whatever it takes to truly accomplish the intention that you've said is most important to you.

2

And for many of you, you have the pouches hanging around your neck as symbols of what you decided was truly important for you. It's an experience that I promise you might very well be one of the most difficult things you've ever done with me if not in your entire life. Cause I know because that's how it is for me and I will be right there with you.

3

How many of you have ever been in a sweat lodge before? Not many but a few of you. How many of you know what a sweat lodge is?

Okay. I was talking to a Native American friend of mine yesterday as uhm I went and I had an appointment and a person very, very steeped in the traditions of the Native American peoples. And he knows what we're up to out here and he has a great respect for it.

You see it's interesting that when I first came to Sedona many years ago before I'd ever done the first Spiritual Warrior I knew exactly what I wanted you to experience but I didn't know how. I didn't really have any contacts here and I didn't really know who could help me pull it off and yet I knew I wanted to do it here. Not here Angel Valley but here Sedona. And a a whole chain of events, a series of events led me to this place and led me to this now friend of mine who was helpful.

But when I very first came and talked to one of the Native American's here in Sedona about sending you on a Vision Quest it was really interesting because his first response was white people can't do that. And he he really meant that and I said yes they can. And then when I told him about the sweat lodge he kind of chuckled and white people can't do that. I said yes they can. So when I was talking to my friend yesterday he's been a part of many of my lodges and he's been a part of many, many lodges. And he

was saying yesterday no one has been in a sweat lodge until they've been in your lodge. He said the only sweat lodge I've ever seen that even comes close to your lodge James are the Lakota sweat lodges. And he said you know the Lakota are crazy.

4

We've we've talked about in many different contexts and even here that the only the only thing that's been empirically demonstrated to move you forward in your own evolution are what, who remembers? Altered states.

You're gonna have if you choose to play full on which I'm gonna challenge you to do, you're gonna have one of the most intense altered states you've ever had in your entire life and may ever have in your entire life. Let me tell you in advance even though I'm leading the lodge there comes a point in time just like we saw our friends with the books where I have to I have to not be James anymore.

Because I've been in a lot of lodges and there's no lodge like my lodge. It will be the most intense experience, the most intense heat that you've ever experienced in your entire life, I guarantee that.

You will feel as if you're going to die. I guarantee that. But you see the true spiritual warrior has conquered death and therefore has no fear and no enemies in this lifetime or the next because the greatest fear that you'll ever experience is the fear of what, death. You will have to get to a point where you surrender and it's okay to die.

5

And that's the extreme value of this ceremony because symbolically you will go into it it's a lodge is a rounded structure. They've been they started building it today. Some of you may have seen that happening if it's, if your lodging is over this direction. But they built sticks up in a, in a rounded fashion and there's one entrance. They throw tarps over the top of it, it's very low, you cannot stand up in it because heat rises and we don't want it to rise too far.

6

And when you're going into a lodge symbolically you're going back into the womb. You're going into the womb of Mother Earth and symbolically what you're going to do is to die. To all that shit and all the limitations and all the stories and all the things that you've allowed to be your truth and have caused you to sell yourself short and it's such a great metaphor. You know if you've been on this journey with me for any amount of time you know there's all kinds of physical metaphors and there, there's probably nothing greater than the lodge, my lodge.

7

Because at some point in time you just have to let go and say if I'm gonna die it's okay because I don't ever die, not really. My body dies, I don't die. You most likely will feel like your skin is going to fall off of your body.

It's hot, hallatious hot. And even though I'm leading the lodge I guarantee you every single year I approach the lodge with great respect. I've been anticipating it all day long because by about the second or third round I'm normally thinking why the hell am I me? Why couldn't I just do a weiney ass lodge like someone else does and the reason is because when you emerge you will be a different person.

Because when you have faced your own death you stared it in the eyes and you've overcome it, then life's never the same it's really just not. It's just not.

8

Now I'm sure there's gonna be some questions. But have I told you to hydrate, hydrate, hydrate, hydrate, hydrate, hydrate, hydrate? Have I told you to take salt all week long, yeah? So please remember that. We're not going to have lunch because the last thing you want in a lodge is a full stomach that has to be emptied in the lodge for everyone else to sit on. Not a good thing.

9

When you enter the lodge you are entering a temple. I ask you to treat it as such. While it's rustic in the traditions you are entering a temple. It's every bit as sacred as to go to the Vatican or anywhere else that you may go to worship, the Taj Mahal.

10

Historically you are moving into a temple. Anytime you move into a sacred circle then you only move one way in a sacred circle. Who knows which way? Clockwise so let's give you a visual. We're gonna be entering from the south correct? Yes. And the south represents what? Transformation and what element? Fire, how appropriate.

Now so we'll have a doorway in the south. When you come in you will go clockwise and you'll go all the way around to the first spot available. I will go in first, Meghan will follow, Taylor will follow Meghan and then it will shake out however it shakes out from there. You fill in along the back, you're gonna be sitting on Mother Earth, right in the dirt.

So whatever clothes you brought to we told you to bring I don't know what it says in the participant guide, a bathing suit or something? Hopefully it's not a very nice bathing suit because it will be munged up by the time we're done, I promise you. So whatever you choose to wear you know if you have a bathing suit that's fine uhm I guarantee you that no matter now cutesy you might look normally you ain't gonna look cute when you're done. So I would encourage you to to you know a pair of shorts and a t-shirt is a good way to go for the ladies, you know swim trunks for the men.

But we're gonna go in, you will not be able to stand up. You'll make one full rotation around the lodge and you'll stop wherever the position is. Now invariably what starts to happen almost every year is that you think you're gonna sit with that much space between you but you're not. You're not.

If you have touchaphobia you're gonna have to get over it because everybody's gonna be butted up against everybody, shoulder to shoulder. So you'll tuck in as close as you can to each other against the back wall. In the middle is the pit okay? So once the back wall is full all the way around then if you come in and you come full rotation and there's no more gaps so you've got to make a full rotation right? So excuse me let me correct that.

You've got, you've got you will stop I'm not gonna make you make a full rotation. You will stop wherever the line is stopped but pretty soon someone's gonna come in and it's full up to here.

Now we need to leave one space here for our stone master who's gonna bring in what's called the grandfathers.

11

Now in the Native American tradition everything has a consciousness, everything is an energy and they believe the stone people are the most ancient people on the planet. And so out of respect for the tradition they're gonna be they're heating our grandfather's right now. They're heating them right now, getting them to a fevered pitch.

And they will bring them in normally one maybe two at a time. I will call as the grand master in this temple and I need you to think of it that way because the person running the lodge is just is like a priest if that if that if you understand that. Treat it with respect please.

That means you don't talk over me, you don't say anything unless you're asked to say anything.

But I will call for the grandfathers and they will come in and traditionally what we do is the grandfather's come in is we all yell in unison Aho Grandfather. Let's practice it. Aho Grandfather. And so as they come in each time they come in Aho Grandfather which is just a symbol of respect to to the consciousness of earth itself.

And so Aaron is gonna be our stone master. He will be taking the pitchfork and sliding them on in and you know I just follow my inspiration.

But for those of you who have been in a lodge before I normally start with about 12 stones first round if that tells you anything. We're gonna, we're gonna lift off fast okay?

Now once once this outside line then this first person's gonna come all the way around and sit in front of Meghan, you cannot sit in front of me because I have to run the ceremony. So you will sit right whoever's on the inside row will sit right in front of Meghan and if you're on the back row what's really nice for your your fellow lodgers is if you'll pull your knees up in front of you then they can lean against your legs as a back support. Okay?

12

Once we're all in, let me back up. Before we enter we're going to do a sacred fire ceremony out here in front of the lodge. You will bring all of your pages that you've recapitulated out of your notebook. You're gonna tear them out of your notebook and you're gonna offer them to the fire in assemble of release. And let the fire just burn them and transform them. And we're going to breath and feel yourself lighten and it's just gone, just just symbolically those things are gone from your life.

13

You will also offer your stone to the pit where the grandfathers are. Now we have a person, the people, this is a very sacred lodge. The person who's down here preparing our grandfathers is not just heating stones. He he is praying over those stones, he's, he's, he's holding sacred space over those stones, he's setting intentions for a great experience for you over those stones and so please when we get there we're gonna circle around the fire but remember this is this is something that's as old as time and we need to take it seriously. And approach it with with great, great respect.

14

Willing to do that say yes. Good so we're gonna offer the stones, you always release with your right hand whether it's the papers or the stones. Energy comes in from the left and exits through the right so you always are gonna give away what you don't want into the fire with your right hand.

15

You're gonna have your tobacco pouches around your neck like many of you already do. You will be saged before you get in to the temple. Now sage historically has been a cleansing agent and so please remember as always it's not the ritual it's what you bring to the ritual. You will stand like this like a 5 pointed star and you'll be saged all the way around your body, all the way around. You'll have to lift up one foot, lift up the other foot. They'll go all the way around your body and you're gonna breathe. You breathe and you set your intentions and you release any fears, you release any lack of courage, you release any limitations.

This this is your ceremony and you begin at the moment that you start to get purified with sage. When the Dream Team is finished saging you, you will turn around and they'll will do it from the back again. Around the back you don't have to lift your foot the second time. They'll just go down your foot, up between your legs and around and around, they'll get around your crown shakra, they'll get around your heart and when your saged you'll get a hug and then when you enter the lodge after we've already released things in the fire, you've been saged, you enter the lodge, you pause for a moment out of respect at the doorway.

16

And you do whatever comes naturally to you out of respect quickly. You take a breath, you set your intention, you get your heart, mind and spirit in alignment. You squat down and you'll have to crawl cause you can't stand up in this. You might, you might be able to to shimmy like this, I'm not sure. It's really low? Okay good nowhere for the heat to escape. Damn it.

17

Now once we're all in then we'll begin the ceremony. Now I'll call in the grandfathers. Once the grandfathers are in we'll close the gate. It'll go completely pitch black. If you have darkness or claustrophobic issues this is an opportunity for you to get over them, to set yourself free from that. Cause it'll be pitch. Eventually your eyes will adjust and you'll see some some glow from the middle of of the pit.

18

Now those of you, I will just tell you those of you on the inside circle you get more of the heat. Everyone gets the heat but it's hotter on the inside then it is on the outside. So there's two ways to approach any kind of activity in life. There's thinking only of me or there's thinking of me and others. And I encourage you to take option two which is me

and others and so there might come a time during some of the rounds in the lodge where someone's in front of you and they go hey can I just, can we switch places for a couple minutes and it would be a really nice gesture to to be willing to do that.

19

Now here's what we know about heat. Heat goes which direction? Rises. There's not gonna be a lot of places for it to go cause the lodge is low. However heat does rise so when it gets hot, by the time we get to like the twenty seventh round, just kidding.

I will promise you we'll have at least seven rounds, at least seven rounds and again it just depends on how I get inspired.

20

And and and you've got to just, you've got to surrender to it and you've got to get into the sacred space. And one of the ways we're gonna do that is we'll be doing some chanting, we'll be saying some prayers, you'll be only when I tell you though.

21

I'm the master of the lodge and so when I tell you to do something then that's when you do it.

When you come into the lodge and you've set your you find your place then you're gonna take your tobacco pouches off and your very, you're gonna very gently, it's made out of sticks. So it doesn't, it can't take a lot of duress but you're gonna tie your tobacco pouches on the framework of the lodge right above your head. So symbolically all of your intentions and your rituals that you've done already are right above your head and you're gonna have, you're gonna have the the first pouch which represents what, who remembers? Underworld good, closest to you and then going up. Alright so you can just I don't know if you're gonna tie a knot or you stick it under the stick or whatever but be gentle because the structure is is obviously it's not gonna take a lot of duress. You're gonna, you're gonna put that up above your head, no knots okay? Yeah cause they're too hard to get off and you're gonna want to take it off later, you're not gonna leave it in the lodge.

21

So we'll do at least seven rounds because you have seven pouches. We got to do at least one for every round every pouch. And normally the first round for me is just a warm up round so you're just gonna have to get in that space where hey you know it's

just like holding the books or doing anything else, I'm gonna have to transcend my physical body.

22

And you can do this. You can do this. Regardless of whether you think you can or you can't you can, I know you can. We've been doing this for years, you can do this. It's just a matter of whether or not you will.

And there's gonna come a time where you're gonna want to run, you're gonna want to bolt. I know cause I feel that way too and it's in those moments where you get to say hey, this is my chance to live impeccably. This is my chance to live honorably and to to live my values above and beyond my moods.

Because mood says get the hell out of here but this is my commitment and what I'm willing to do and so that's why it's such a great, great metaphor.

23

So every single round we'll bring in, the first round I will use you'll get saged outside.

First round I will use, I'll offer some sandalwood, we're set right? Offer some sandalwood to the fire and to the lodge. Sandalwood historically has been has been the incense of the angel, the Archangel of Earth.

24

Now one of the things you'll know about my lodge if you've been in a lodge before is that I'm very eclectic as we are, as we all are. So I'll I may teach you Hebrew chants, which is not very Native American. I may call forth Archangels.

I I really don't know what I'm gonna do until I get in there and it starts to happen but I will pull from every tradition at some point in time that I've been exposed to and will bring all those energies and all that sacredness into the lodge and that's one of the reasons why my Native American friend says hey your lodge is so amazing because there's nobody who does that. No one else who does that.

So I'll offer sandalwood uhm to the fire to begin first round and then we'll start our first round. We may do some chanting first, we may say some prayers first, I definitely at some point will ask you to offer up your prayers to the lodge and to the universe for each of your seven pouches.

So so when it's time for the underworld it'll be time for you at that point to proclaim forth what you've committed to doing in in that direction with your unconscious issues in this instance. And you'll need to proclaim it like like you really mean it and you'll keep doing it until you feel complete on that.

And so we'll have that time with each round, the pouch specific rounds to do your prayers, your proclamations uh for your intentions and and that's where you really find your strength. You'll find your strength in the unity of this group. You'll find your strength in the connectivity to your intentions and the things that you've said were important to you out in the desert.

25

Now a couple things physically. Because heat rises when it gets really, really hot the closer you get to Mother Earth the cooler it is and so you might if it's just really hot you might want to to just lay your face down or get down closer to Mother Earth and she will cool you.

It will probably be slushy and sandy, you know I mean there's never, there's not been a year where I haven't come out with sand all up in my ears and nose and hair and everywhere else. But you know that's what showers are for.

We talked about switching places, possibility.

26

If and I'm not saying this intention but I'm just gonna tell you my one of my teachers taught me a long time ago prepare for the worst and expect the best.

So my expectation because I know what you can do, my expectation is that you're gonna go through this like a Samurai. And you're gonna overcome whatever's going on in your head; this mother fucking James Ray shit right? Or whatever you're gonna transcend that and it's gonna show you, it's gonna give you a very powerful reference of what you're capable of doing, what you're really capable of doing.

27

Now that being said if you, if you just get to the point where you just, you just you gotta leave, you you just feel like you cannot then a couple things.

Is that please remember this is extremely hot in the center and many of you are gonna be close to that. Now it's a sacred temple and you only move what way? Clockwise, so

if you have to leave then you need to and you're right here you can't duck out this way. You have to go all the way around and go out of the lodge.

28

Now after every round we'll open the gate for more grandfathers and sometimes I'll leave it open for a little while for just to let some fresh air in.

29

And so you cannot leave during a round.

If you have if you feel like you just cannot transcend and overcome this then when the gates are open if you have to leave you leave and you leave very very in a controlled manner. Very carefully because there's legs and it's dark. There's legs and there's knees and there's elbows and you know the last thing we want is anybody in the pit.

We've never had anyone in the pit but just make sure you make your way around and and you exit out of the lodge.

30

Now that we've prepared for that I'm expecting the best.

However when we leave the lodge, when it's done then I will go out first and the outer row will follow me all the way around and and please here here's what's gonna happen.

31

You will be in such an altered state, probably the most you know profound altered state you've ever been in minus psycho actives. Seriously I mean you, you may see visions, it's a, it's a great opportunity for you to explore your own consciousness. We've had people who just don't even know where they are anymore.

I mean if any of you saw Mike after he held the books last night he, he, he wasn't there. It took him awhile to get back into his body and get grounded and it's gonna be similar at the lodge.

It's gonna take you awhile to get your bearings back again and come into the third dimension because you're gonna be in an altered dimension literally and so what that means and and and let me tell you up front because what starts to happen and has happened in years past is that you forget where you are, you forget what you're a part of and you know people start yelling crazy stuff in the lodge.

Well that's disrespectful. It's disrespectful to the lodge and I've had I've had to to warn one particular person in past years, hey if you don't quiet down I'm going to ask you to leave because you're disrupting the ceremony.

32

So it's gonna be a great opportunity for you to be able to be lucid in an extreme altered state. And I can't describe it to you till you've been there but you'll know what I'm talking about tonight when it's done because it's an extreme altered state.

33

Now that being said when we exit invariably there's at least one or two people who are like oh my God it's over I've gotta get the hell out of here. You know and they and they try to stampede and that's very dangerous.

You're gonna have to keep your shit together as much as you can in an extreme altered state and just hold on. You know it's over; you made it, congratulate yourself and just hold on. If you just wait till the lines get out of there it's gonna take you you know two minutes to get out of there instead of stampeding the door and potentially hurting yourself or hurting someone else.

34

When you come out there's a there's an extremely healthful, physiological experience on this, for this.

You will purge toxins like you've never purged toxins before. You know it'll be running out of your nose, it'll be running out of your pores. You you will get rid of a lot of physiological toxins which is very healthy. Now your pores are gonna be wide open so when you come out first of all I want you to come out reborn.

You're coming out of the womb of Mother Earth. Come out reborn and the first thing we're gonna do is hose you down with cold water. Now that's not gonna be your favorite thing probably but there's a physiological reason for this.

Your pores are wide open and the toxins that are in your system are gonna come out on to your skin and if they haven't dropped off in the lodge yet then they're sitting on top of you. If you don't, if you don't close your pores then those toxins are gonna go right back in, does that make sense, say yes.

Good. So you need to close those pores that's why why it's always very very important after a sauna or anything else to take a cold shower or a cold plunge. Because you've got to close those pores and get the toxins and the cold water will close it'll be shocking I promise you but it'll also feel amazing.

It's kinda one of those shock amazing things at the same time. And it will rinse all the toxins off of you and then you're gonna want to hydrate. And we'll have, we'll have all your waters.

35

Hydrate between then and now and we're gonna be there shortly, very shortly. Alright so hydrate, hydrate and bring water with you down there and we'll have a table out there you can leave your water on and so you get sprayed off and then you drink and then we're going to from that point we're gonna take a break.

You have forty five minutes to go get cleaned up and then we'll have a celebratory dinner.

36

Now here's the other thing that's really cool about sweat lodges. You when you come out your skin will feel like it's never felt before. It will be like baby soft skin. I mean it's, it just peels off the crap, it really does. It's very very good for your skin to do this.

37

We'll have a celebratory dinner at 6:30 and then at 7:30 we'll be back in here to share our personal breakthroughs and our experiences. So we're supposed to be there in fifteen minutes.

38

What questions do you have? Oh jewelry thank you. You must remove all your jewelry, all your jewelry. Now I personally am not gonna remove this ring because first of all it doesn't really come off. The thing about but this ring will heat up at the same time my body does but necklaces won't and they'll burn you. They can literally scorch you you know cause cause it'll be getting hot and it'll get in your skin. So all earrings and and necklaces and watches and everything else needs to come off. If you have a wedding band and you want to leave it on that's great uhm I'm gonna leave this one on uhm but only because of the reasons I've already, this is a very special ring very important to me and and it doesn't come off very easily. Any other quick questions on the lodge? Yes.

39

Unknown:

James are we close enough to the creek that we can get in that?

James Ray:

No, no, no you get the hose. Okay quickly, come on quick.

40

Unknown:

About how long does it take?

James Ray:

The lodge?

Unknown:

Yeah

James Ray:

Oh I don't know.

Unknown:

Yeah just approximately

James Ray:

Two hours maybe, three hours.

41

h oh yes one other thing I almost forgot, a very important thing. Historically you give you always give a gift to your stone master. The person who's preparing your stones and he is very lovingly doing that. He's worked with us for many years. A wonderful man and he puts a lot of heart and this is hard work. It's very hot down there around that fire, he's heating up those stones right now and so so you know if each of you would bring 3 to 5 dollars, just 3 to 5 bucks is plenty and if we all give 3 to 5 bucks then we can, when are we gonna do it? We're gonna give it to Melinda, she'll put it in an

envelope and then I'll present it to him from us. So if everybody'd just be prepared to do that, give it to Melinda. 3 to 5 dollars uhm is is is really more than enough, okay? Yes?

42

Unknown:

James does this raise your blood pressure?

James Ray:

Uhhhh, yeah it could. It could. Just like working out raises your blood pressure. So you'll have to choose to take care of yourself as you feel that you need to take care of yourself.

43

Other questions? Take, Meghan's giving me all kinds of signals. Take your makeup off, we don't want it running onto our legs and shit and you know in the lodge. Take your makeup off. Yes?

Unknown:

Uhm if there's a choice to sort of is it easier if your skin is exposed or covered with a t-shirt? Not easier, does it make a difference?

James Ray:

There's no easy. There's no easy on this. Uhm I don't know, I've never worn a t-shirt. You know traditionally you go in naked and there's some of you I just don't want to see. So so please at least wear trunks. Yes?

44

Unknown:

What if you need to use the restroom during?

James Ray:

You go before you get in.

Unknown:

What about during?

James Ray:

You go before you get in.

45

Take out contacts if you wear those, yeah earrings, necklaces, no glasses.

Unknown:

I know but should we leave them back in our thing or right outside

James Ray:

It depends on how blind you are unless you need them. If you can, if you can walk down there without them, I would encourage that. Leave them in your, in your room.

46

Okay other questions quick, quick, hang tight folks we're all trying to scramble here too fast. Uhm 3 to 5 dollars, your tobacco pouches, your stone, your pages that you're gonna burn and a a determination of steel and a commitment to show yourself and the universe that you're willing to live your values above and beyond your moods or your physiological creeks and crones.

47

Unknown:

And where is it that we will meet?

James Ray:

We're gonna meet straight down there, you'll see the lodge. Okay straight down here at like 2:15 like seven minutes from now. Ready, GO!